FINAL STATEMENT OF REASONS

Resources Agency CEQA Guidelines Amendments of 2004
(OAL Notice File Number Z-030812-01)

July 2004

1. Update of Information Contained in the Initial Statement of Reasons

REASONABLE ALTERNATIVES TO THE REGULATION, INCLUDING ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS, AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Agency considered the no action alternative for each section, and the alternative to Section 15333 as explained below, but did not identify any alternative that would lessen any adverse impact on small business. Other alternatives considered by the Resources Agency in response to public comments are summarized and discussed in section three of this final statement of reasons. The no action alternative was rejected because it would not achieve the objectives of the proposed amendments. No alternative considered by the Agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENTS

The Secretary did not rely upon any technical, theoretical, or empirical study, report or similar document in proposing any of the amendments or adoptions other than the adoption of Guidelines Section 15333, as explained below.

NOTICE OF MODIFICATIONS AND NON-SUBSTANTIVE AMENDMENTS

After the comment period for the additional modifications to the proposed revisions to the CEQA Guidelines closed on June 11, 2004, Agency made four additional changes to the proposed amendments and identified one modification that had not been previously identified with strikethrough formatting. These changes are explained below:

1. Section 15065(a)(3): Agency eliminated the phrase "as defined in section 15130" from this subsection. Because Agency withdrew the definition of "probable future projects" proposed in section 15130, this cross-reference

is inappropriate. This change has no regulatory effect. Section 11346.8(c) of the Government Code allows changes that are non-substantial or solely grammatical in nature, and Title 1 section 100(a)(4) of the California Code of Regulations permits changes for the purpose of revising structure, syntax, cross-reference, grammar or punctuation.

2. Section 15088.5(f)(3): In amendments proposed pursuant to Government Code section 11346.8(c), Agency deleted the word "draft" but did not note this deletion with strikeout formatting. Because the public had notice of this change in the amendments proposed pursuant to Government Code section 11346.8(c), the Agency's inadvertent omission of strikeout formatting for this word had no material effect on the rulemaking process.

3. Section 15094(a): The proposed amendments to this subsection used the duplicative phrase "by the lead agency." Agency has deleted this phrase from the end of subsection 15094(a). The elimination of this redundant phrase has no regulatory effect. Section 11346.8(c) of the Government Code allows changes that are non-substantial or solely grammatical in nature, and Title 1 section 100(a)(4) of the California Code of Regulations permits changes for the purpose of revising structure, syntax, cross-reference, grammar or punctuation.

4. Section 15094(e): Agency amended the language "A notice of determination filed with the county clerk <u>is</u> available for public inspection" to "A notice of determination filed with the county clerk <u>shall be</u> available for public inspection." This change is necessary to make the language in subsection 15094(e) consistent with the parallel language of subsection 15094(f). This change has no regulatory effect. Section 11346.8(c) of the Government Code allows changes that are non-substantial or solely grammatical in nature, and Title 1 section 100(a)(4) of the California Code of Regulations permits changes for the purpose of revising structure, syntax, cross-reference, grammar or punctuation.

5. Section 15152: Agency has withdrawn all proposed amendments to this section.

SECTION 15023. OFFICE OF PLANNING AND RESEARCH.

Specific Purpose of the Amendment

The proposed amendment to CCR Section 15023 is intended to implement Senate Bill (SB) 761, (Chapter 716, Statutes of 2000). SB 761 amended Section 21159.9 of the Public Resources Code (PRC), and requires the Governor's Office of Planning and Research (OPR) to establish and maintain a central repository for the collection, storage, retrieval, and dissemination of

specified notices, and to make the notices available through the Internet. By requiring OPR to post notices on the Internet and maintain a central repository of notices, the proposed amendment will update this section describing OPR's role in the CEQA process and notify interested persons of OPR's Internet service. The reference for this section will also be updated to enhance clarity.

Necessity

Section 15023 currently describes OPR's role in the CEQA process, but does not contain language implementing SB 761. The proposed amendments are necessary to update this section to reflect this statutory change.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed additions to section 15023 will not adversely impact California business because they simply describe a service provided by OPR.

SECTION 15062. NOTICE OF EXEMPTION.

Specific Purpose of the Amendment

The proposed amendments to CCR Section 15062 are intended to provide additional guidance to public agencies regarding the location information that should be included in the notice of exemption (NOE). Project location information is already requested on the NOE form provided in Appendix E of the Guidelines. By clarifying and standardizing the types of location information that should be included consistent with CCR Sections 15082, 15085, and 15094, the amendment will facilitate more informative public notice regarding basic project information.

Necessity

The lack of specific information concerning the project location within the notice of exemption has lead to uncertainty and confusion in some cases. The proposed amendments address this issue and are necessary to clarify what type of location information should be included in the NOE.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

Since the proposed amendments provide clarification of existing statutory requirements that apply to state and local agencies, they will not result in an adverse impact on businesses in California.

SECTION 15064. DETERMINING THE SIGNIFICANCE OF THE ENVIRONMENTAL EFFECTS CAUSED BY A PROJECT.

Specific Purpose of the Amendment

Subsection (h) explains the process agencies use to determine whether a project's cumulative effects rise to the level of significance and require an EIR. The proposed amendments are intended to clarify cumulative impacts analysis and the definition of "cumulatively considerable." The proposed amendments to subsection (h)(3) are intended to clarify that an EIR must be prepared for a project that may have a significant environmental effect even if the project meets the standard set forth in subsection (h)(3).

Necessity

The proposed amendments are necessary to provide better guidance to lead agencies in assessing whether a cumulative effect requires preparation of an EIR.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

Since the proposed amendments provide clarification of existing law controlling state and local agencies, they will result in no adverse economic impact on business in the state.

SECTION 15065. Mandatory Findings of Significance.

Specific Purpose of the Amendment

The proposed amendments clarify the conditions that trigger the mandatory finding of significance including providing that the finding is not triggered unless the project has the potential to substantially reduce the number or restrict the range of endangered, rare or threatened species, providing an incentive for regional biological planning through the natural community conservation planning (NCCP) and habitat conservation planning (HCP) process, clarifying applicability of the mandatory findings beyond the initial decision of whether to prepare an EIR, and identifying certain situations where the potential to trigger a mandatory finding does not require an EIR because mitigation will either avoid any significant effect on the environment or mitigate significant effects to the point where clearly no significant effects on the environment would occur. Finally, non-substantive changes to the text have been made throughout this section to clarify its meaning.

Necessity

The amendments of 15065 are necessary to provide additional guidance and clarity to lead agencies in determining when a project may have significant effects on the environment and thereby require preparation of an EIR.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed amendments will not result in an adverse impact on business in California because they clarify existing requirements in connection with the CEQA process followed by state and local agencies.

SECTION 15075. NOTICE OF DETERMINATION ON A PROJECT FOR WHICH A PROPOSED NEGATIVE OR MITIGATED NEGATIVE DECLARATION HAS BEEN APPROVED.

Specific Purpose of the Amendment

The proposed amendments of this section, along with the proposed changes to CCR Section 15094, are intended to make the NOD filing requirements consistent between EIRs and negative declarations. Additionally, the amendments clarify the contents and format of an NOD and enhance consistency with statutory provisions. The amendments clarify the timing and other requirements for filing the NOD with OPR. The amendments also clarify the action that triggers the statute of limitations in court challenges, which is different between state and local agencies, pursuant to the decision in *Citizens of Lake Murray Association v. City Council* (1982) 129 Cal.App. 3d 436. Finally, non-substantive changes to the text have been made throughout this section to clarify its meaning.

Necessity

The proposed amendments are necessary to make the filing of NODs consistent for EIRs and negative declarations, and to provide added guidance and clarity concerning NOD filing, contents, and format.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

Since the proposed amendments provide clarification of the existing NOD process for local and state agencies, they will result in no adverse economic impact on business in the state.

SECTION 15082. NOTICE OF PREPARATION AND DETERMINATION OF SCOPE OF EIR.

Specific Purpose of the Amendment

The proposed amendments to CCR Section 15082 are intended to implement and make specific AB 1532 amendments to PRC Sections 21081.7, 21083.9 and 21159.9. AB 1532 requires the lead agency to call at least one scoping meeting for a project of statewide, regional, or areawide significance. The proposed amendments are also intended to implement and make specific AB 1807 (Chapter 738, Statutes of 2000) amendments to PRC Sections 21080.4 and 21081.7. AB 1807 requires all NOPs to be sent to the State Clearinghouse within OPR. Consistent with CCR Sections 15062, 15085, and 15094, the amendments will standardize and provide additional guidance to public agencies regarding the location information that should be included in the NOP.

Necessity

Section 15082 describes the requirements for preparing a notice of preparation after a lead agency determines that an EIR is required. It is necessary to clarify that such notice be sent to OPR and each trustee agency. Further, the current language does not provide a consistent method of providing project location information in CEQA notices. In addition, the current language does not describe the requirement of a scoping meeting concerning projects of statewide, regional, or areawide significance. It is necessary to incorporate these statutory requirements and clarifying amendments into the CEQA Guidelines to avoid confusion.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Because the proposed amendments add clarity to this section, enhance consistency with other CEQA notice requirements, and incorporate existing statutory requirements into the CEQA Guidelines, they will result in no adverse economic impact on business in the state.

SECTION 15085. NOTICE OF COMPLETION.

Specific Purpose of the Amendment

The proposed amendments are intended to standardize the data lead agencies submit to OPR and assist OPR in maintaining an accurate and consistent database of environmental documents. (See CCR sections 15062, 15082, and 15094.) Additionally, the proposed amendments are intended to provide guidance to public agencies regarding the location information that should be included in the NOC. By clarifying the types of location information

that should be included, the amendment will facilitate a more informative public notice regarding basic project information. Finally, non-substantive changes to the text have been made throughout this section to clarify its meaning and to cross-reference the appropriate forms available in the appendices of the Guidelines.

Necessity

The proposed amendments are necessary to standardize the data lead agencies submit to OPR by directing lead agencies to use the NOC form. This is also necessary to provide guidance regarding the project location information and clarify the types of information to be included in the NOC.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments provide clarification of existing statutory requirements for local and state agencies, they will not result in an adverse impact on business in California.

SECTION 15087. PUBLIC REVIEW OF DRAFT EIR.

Specific Purpose of the Amendment

The proposed amendments are intended to identify Appendix L as a sample NOC form for local agencies to provide public notice of the availability of draft EIRs.

Necessity

The proposed amendments are necessary to identify Appendix L as a sample local NOC form used to provide public notice.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments simply identify a sample NOC form that local lead agencies may use, the amendments will not result in an adverse impact on business in California.

SECTION 15088. EVALUATION OF AND RESPONSE TO COMMENTS.

Specific Purpose of the Amendment

PRC Section 21092.5 requires the lead agency to provide a written proposed response to comments made by another public agency at least ten

days prior to certifying an EIR. The proposed amendments to CCR Section 15088 are intended to implement this requirement. The reference citation for this section has also been updated.

Necessity

In its current form, section 15088 requires lead agencies to evaluate and respond to comments from persons who review the EIR. The current amendment is necessary to incorporate the statutory requirement that lead agencies respond to comments made by other public agencies.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments to this section represent incorporation of existing statutory provisions into the Guidelines, they will result in no adverse economic impact on business within the state.

SECTION 15088.5. RECIRCULATION OF AN EIR PRIOR TO CERTIFICATION.

Specific Purpose of the Amendment

The proposed amendments are intended to implement and make specific PRC Section 21092.1, which addresses the situation where significant new information is added to an EIR after notice and consultation but prior to certification. The purposes of the proposed amendments are to clarify the contents of the notice required by PRC Section 21092.1 and the recirculation process.

Necessity

The proposed amendments are necessary to clarify the requirements set forth in PRC section 21092.1 concerning the content of the notice, and to address situations where significant new information is added prior to certification of an EIR.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments to this section represent incorporation of existing statutory provisions into the Guidelines, they will result in no adverse economic impact on business within the state.

SECTION 15094. NOTICE OF DETERMINATION.

Specific Purpose of the Amendment

The proposed amendments to this section, along with the proposed changes to CCR Section 15075, are intended to make the NOD filing requirements consistent between EIRs and negative declarations. Additionally, the amendments will clarify the contents and format of an NOD and enhance consistency with other regulatory and statutory provisions. The amendments clarify the timing, location information, and other requirements for filing the NOD with OPR. The amendments also clarify the action that triggers the statute of limitations in court challenges, which is different between state and local agencies, pursuant to the decision in *Citizens of Lake Murray Assn. v. City Council,* (1982) 129 Cal.App. 3d 436. Finally, non-substantive changes to the text have been made throughout this section to clarify its meaning.

Necessity

The proposed amendments are necessary to make the filing of NODs consistent for EIRs and negative declarations, and to provide added guidance, uniformity, and clarity concerning the NOD contents and format.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments provide clarification of existing statutory requirements for the filing of NODs by state and local agencies, they will not result in an adverse impact on business in California.

SECTION 15097. MITIGATION MONITORING OR REPORTING.

Specific Purpose of the Amendment

The proposed amendments to CCR Section 15097 are intended to implement and make specific AB 1807 (Chapter 738, Statutes of 2000) amendments to PRC Sections 21080.4 and 21081.7. AB 1807 requires transportation information generated by reporting or monitoring programs for projects of statewide, areawide, or regional importance to be submitted to the California Department of Transportation in addition to local transportation planning agencies.

Necessity

In its current form, section 15097 requires transportation information generated by a required monitoring or reporting program to be reported to a local transportation planning agency. It does not contain the statutory requirement

that the transportation information also be submitted to the California Department of Transportation. It is necessary to amend section 15097 to reflect this statutory provision.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments to this section represent incorporation of existing statutory requirements for state and local agencies into the Guidelines, they will result in no adverse economic impact on business within the state.

SECTION 15126.4. CONSIDERATION AND DISCUSSION OF MITIGATION MEASURES PROPOSED TO MINIMIZE SIGNIFICANT EFFECTS.

Specific Purpose of the Amendment

The proposed amendments to this section provide guidance and clarification that curation may be an appropriate mitigation measure if an artifact must be removed during a project. PRC Section 5020.5 has been added to the reference for this section for further guidance regarding curation.

Necessity

The proposed changes are necessary to provide clarity and guidance to lead agencies regarding the availability of curation as a mitigation option when archaeological artifacts must be removed during project excavation.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments simply clarify that curation is one mitigation option, they will result in no adverse economic impact on business in the state.

SECTION 15205. REVIEW BY STATE AGENCIES.

Specific Purpose of the Amendment

The proposed amendments are intended to implement AB 3041 which amends the requirements of PRC section 21091 as to the number of copies of an EIR or negative declaration that must be submitted to OPR. It also clarifies that (1) the NOC form must be submitted to OPR with the copies of the EIR, and (2) agencies can use the Internet NOC form or the form in Appendix C. The amendments are also intended to enhance consistency with other provisions of the Guidelines that specify the use and contents of the NOC form.

Necessity

In its current form, section 15205 requires at least ten copies of an EIR or negative declaration to be submitted to OPR. The proposed amendment is necessary to update this section consistent with the amendment to PRC Section 21091's requirement that a "sufficient number" of copies be provided to OPR. The proposed amendments are also necessary to clarify the NOC submission process.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments update the Guidelines to reflect existing statutory requirements and clarify the NOC submission process followed by state and local agencies, they will result in no adverse economic impact on business in the state.

SECTION 15206. PROJECTS OF STATEWIDE, REGIONAL, OR AREAWIDE SIGNIFICANCE.

Specific Purpose of the Amendment

Consistent with other Guidelines provisions, the proposed amendments are intended to clarify that the NOC form must be submitted with the copies of the EIR and that agencies can use the Internet NOC form or the form in Appendix C.

Necessity

The proposed amendments are necessary to clarify the NOC form submission process.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed changes clarify existing requirements that apply to local and state agencies, they will result in no adverse economic impact on business in the state.

SECTION 15252. SUBSTITUTE DOCUMENT.

Specific Purpose of the Amendment

The proposed amendment is intended to clarify the existing statutory requirement that lead agencies approving projects in accordance with certified

regulatory programs shall file a notice of the decision on the proposed activity with the Secretary for Resources.

Necessity

The proposed amendment to section 15252 is necessary to provide guidance to lead agencies implementing certified regulatory programs on the existing statutory requirement to file a notice of decision with the Secretary for Resources.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments implement and clarify an existing statutory requirement of state agencies with certified regulatory programs, they will result in no adverse economic impact on business in the state.

SECTION 15313. ACQUISITION OF LANDS FOR WILDLIFE CONSERVATION PURPOSES.

Specific Purpose of the Amendment

The proposed amendments are intended to provide structure and clarity to this section by labeling each of the three examples without changing any existing language or punctuation.

Necessity

The proposed amendments are necessary to avoid the misperception that the qualifying language at the end of example (c) regarding the purpose of the acquisition applies to all three examples of acquisitions for fish and wildlife conservation purposes.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments provide clarification of an existing categorical exemption available to state and local lead agencies, they will result in no adverse economic impact on business in the state.

SECTION 15325. TRANSFERS OF OWNERSHIP IN LAND TO PRESERVE EXISTING NATURAL CONDITIONS AND HISTORICAL RESOURCES.

Specific Purpose of the Amendment

The proposed amendment to this section is intended to clarify that transfers of interests in land intended to preserve open space or lands for park purposes are included within this class of exempt projects.

Necessity

The proposed amendments are necessary to clarify that transfers of interests in land to preserve open space or lands for park purposes are included within this class of exempt projects.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments provide clarification of an existing categorical exemption available to state and local lead agencies, they will result in no adverse economic impact on business in the state.

SECTION 15330. MINOR ACTIONS TO PREVENT, MINIMIZE, STABILIZE, MITIGATE OR ELIMINATE THE RELEASE OR THREAT OF HAZARDOUS WASTE OR HAZARDOUS SUBSTANCES.

Specific Purpose of the Amendment

The proposed amendments are intended to remove the language indicating that thermal desorption is included in this class of exemptions because this type of project may be accompanied by air emissions. The term “off-site disposal” has been added with the intent to further clarify which state and local environmental permitting requirements are applicable. Further, non-substantive amendments are intended to improve the clarity of this section.

Necessity

The proposed amendments are necessary to further clarify the Class 30 exemption and applicable permitting requirements.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments provide clarification of an existing categorical exemption available to state and local lead agencies, they will result in no adverse economic impact on business in the state.

SECTION 15333. SMALL HABITAT RESTORATION PROJECTS.

Specific Purpose of the Amendment

The proposed addition of CCR Section 15333 is intended to implement PRC Section 21084 and encourage small habitat restoration projects which are narrowly described to ensure that no significant environmental effects may occur as a result.

Necessity

The proposed amendments are necessary to create a new categorical exemption that will allow small restoration projects to proceed without preparation of an environmental review document.

Reasonable Alternatives to the Regulation, Including Alternatives That Would Lessen Any Adverse Impact on Small Business, and the Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered the following alternative language included in the 2002 report entitled "Removing Barriers to Restoration: Report of the Task Force to the Secretary for Resources":

"Class 33 consists of projects not to exceed five acres in size for the restoration or stabilization of natural habitat for fish, plants, or wildlife provided that:

(a) There would be no adverse effect on threatened or endangered species unless the impact is covered by a habitat conservation plan or an incidental take permit,
(b) There would be no movement of hazardous materials, and
(c) No similar projects have been located within a one half-mile radius of the project during the same year."

Although the Resources Agency initially considered proposing this alternative language, the Agency has further refined the proposal. This action was necessary to make the new exemption appropriately narrowly tailored to enable the Secretary to make the required finding that this class of projects will not have a significant effect on the environment. In addition, to add to the clarity and specificity of the class of projects covered by this exemption, Agency added a new subsection to provide examples of projects that fall within this class. With these changes to the alternative language, the proposed amendments will be effective in achieving the purposes of this new categorical exemption. The Agency did not identify any alternative that would meet the objectives of this proposed categorical exemption and lessen any adverse impact on small business. The no-action alternative was rejected because it would not achieve the objectives of the proposed amendments. No alternative considered by the Agency would be more effective in carrying out the purpose for which the

regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

The proposed addition will not have an adverse impact on business because it allows certain small restoration projects to proceed without additional environmental review.

Technical, Theoretical, or Empirical Study, Report, or Similar Documents

This proposed action was one of ten recommendations of the 2002 report entitled "Removing Barriers to Restoration: Report of the Task Force to the Secretary for Resources." A copy of this report is in the rulemaking file for the proposed regulatory action. The report is also available online at the Resources Agency website (www.resources.ca.gov/) under "Reports & Publications."

SECTION 15378. DEFINITION OF PROJECT.

Specific Purpose of the Amendment

The proposed amendments are intended to provide guidance to lead agencies in determining whether an action is a "project" subject to CEQA by updating this section to reflect developments in the case law.

Necessity

The proposed amendments are necessary to update the Guidelines consistent with recent court decisions.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed changes update the definition of "project" consistent with recent case law, they will result in no adverse economic impact on business in the state.

APPENDIX C.

Specific Purpose of the Adoption

Consistent with the proposed changes to CCR sections 15085, 15205, 15206, and Appendix L regarding the use of the NOC, the proposed changes are intended to clarify which NOC form should be used by local agencies to notify the public that a draft EIR has been prepared and which form is required to be

submitted by the local agency to OPR, standardize the NOC form lead agencies must submit to OPR, assist OPR in maintaining an accurate and consistent database of environmental documents, and facilitate the Internet noticing requirements of PRC Section 21159.9(c).

Necessity

The proposed changes are necessary to clarify which NOC form should be used, standardize the NOC form that agencies submit to OPR, and facilitate the Internet noticing requirements of PRC Section 21159.9(c).

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed amendments provide clarification of the existing NOC process, they will result in no adverse economic impact on business in the state.

APPENDIX D.

Specific Purpose of the Amendment

Consistent with the proposed changes to CCR sections 15075 and 15094 regarding the contents of the NOD, the proposed changes are intended to incorporate into the sample NOD form the required mitigation monitoring information and findings a lead or responsible agency must make in accordance with PRC sections 21081, 21081.6, 21108 and 21152. Non-substantive proposed changes to the format and layout of the NOD are intended to improve readability and clarity.

Necessity

The proposed changes are necessary to improve the readability and clarity of the sample NOD form, and to document implementation of the required mitigation monitoring program.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

Since the proposed changes simply enhance the clarity and utility of a sample NOD form, they will result in no adverse economic impact on business in the state.

APPENDIX L.

Specific Purpose of the Amendment

Consistent with the proposed amendments to Appendix C, the proposed addition of this appendix is intended to provide two separate NOC forms. Appendix C will be the NOC form required for NOCs filed with OPR. Appendix L will be a sample of the NOC form used by a lead agency to notify the public of the availability of draft EIRs.

Necessity

The proposed addition of appendix L is necessary in order to provide separate forms for local NOCs and NOCs filed with OPR.

Support for Initial Determination That the Action Will Not Have a Significant Adverse Impact on Business

This change will result in no adverse economic impact on business in the state because the proposed addition of Appendix L simply provides a sample NOC form that may be used by local agencies for local public notice purposes.

2. Local Mandate Determination

Government Code section 11346.9(a)(2) requires the final statement of reasons to include a determination as to whether the adoptions and amendments of the regulations impose a mandate on local agencies or school districts.

The Resources Agency has determined that the proposed amendments to the CEQA Guidelines will not impose a mandate on local agencies or school districts.

3. Summaries and Responses to Comments

The summaries and responses below satisfy the Government Code Sections 11346.8(c) and 11346.9(a)(3) requirement that the Agency summarize relevant objections and recommendations received during the public comment period and state the reasons for not implementing each comment.

This section provides a summary of the public comments Agency received on the amendments to the CEQA Guidelines that Agency proposed on August 22, 2003 and modified on May 25, 2004. By way of background, Agency filed a notice of proposed rulemaking for its proposed amendments to the CEQA Guidelines with the Office of Administrative Law (OAL) on August 12, 2003. OAL

published the notice in the California Regulatory Notice Registry on August 22, 2003. Public hearings on the proposed amendments were held on September 30th and October 6th of 2003. A transcript of the public hearings and copies of all written comments are included in volume one of the rulemaking file. Agency extended the comment period until October 27, 2003. The comment period closed on October 27, 2003.

Agency made additional modifications to the proposed revisions to the CEQA Guidelines pursuant to section 11346.8(c) of the Government Code. On May 25th, 2004, these modifications to the proposed amendment were made available for additional public review and comment. The second comment period closed on June 11, 2004.

Summary and Responses to Public Comments Received on Amendments Proposed August 22, 2003

(sorted numerically by proposed guidelines changes)

General Comments

Agency received a wide range of comments responding to the proposed action. In addition to specific comments regarding the proposed amendments, Agency received four main sorts of general comments.

First, a number of comments urged Agency to make amendments to various provisions of the CEQA Guidelines in addition to those amendments proposed in this rulemaking action. Such comments and suggestions regarding other possible changes to the CEQA Guidelines are not relevant to the proposed action, and therefore, Agency has not made a detailed, specific response to such comments. See Govt. Code §11346.9(a)(3). However, Agency may consider these proposals in connection with future rulemakings.

Second, Agency received various comments indicating that Agency lacked authority with respect to certain amendments to the CEQA Guidelines. Agency's authority is set forth in sections 21083 and 21087 of the Public Resources Code. These sections direct Agency, with assistance from the Office of Planning and Research (OPR) to prepare, develop, certify and adopt guidelines to implement CEQA. Section 21083 indicates the guidelines "shall" include, among other things, "objectives and criteria for the orderly evaluation" of projects and the "preparation" of environmental impact reports and negative declarations as appropriate under CEQA." In this respect, section 21083 directs and authorizes Agency to adopt procedural and substantive guidelines to implement CEQA. Agency therefore has the statutory authority to exercise its discretion in promulgating amendments to the CEQA Guidelines to implement, interpret, and otherwise carry out CEQA. Any such action, of course, must be consistent with controlling law, and reasonably necessary to effectuate the purpose of CEQA.

(See generally Gov. Code § 11342.2). Agency has ample authority to adopt and certify the amendments in this rulemaking action.

Third, Agency received comments providing the commenters' general reaction to Agency's rulemaking action as a whole. For example, Natural Resources Defense Council, Jan Chatten-Brown, October 27, 2003, East Bay Regional Park District, Daniel Sykes, October 3, 2003, The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003, Sempra Energy, October 27, 2003, and Solano County, James Laughlin, October 27, 2003, expressed general concurrence with the rulemaking action as a whole, although each of the above commenters had specific additional comments on individual sections. No response to these general comments is necessary in light of the commenters' support of the proposed amendments.

Finally, several other organizations made general comments regarding perceived problems with the CEQA process as a whole. For example, California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003, stated that "CEQA…has become an instrument of abuse…..[by neighbors of construction projects] to stop project[s]…" These commenters stated that this use of CEQA drives up project costs, causes California to be less competitive with other states, lowers state and local government tax revenues, and results in higher public works construction costs. The California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003, provided a great deal of information on its position that the CEQA exemption process has been used to foster the "invisible conversion" of agricultural lands to non-agricultural status. Sustainable Conservation, Bob Neale, October 27, 2003, indicated that a common barrier to efforts to get private landowners to enhance erosion control and provide for habitat preservation is the regulatory review process which is "designed to protect natural resources, but often acts as a disincentive to proactive initiatives to restore vital habitat and reduce nonpoint source pollution." Like comments and suggestions regarding possible changes to the CEQA Guidelines not proposed by Agency in this rulemaking action, these general concerns about the CEQA process are not relevant to the proposed action. Therefore, Agency has not made a detailed, specific response to such comments.

Agency also received one general procedural or stylistic comment. Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003, suggested that the word "subdivision" replace "subsection" throughout the proposed revised text of the CEQA Guidelines pursuant to the California Style Manual. Commenters contend that this change would bring the CEQA Guidelines in line with terminology used by attorneys and judges when citing the California Codes and the California Codes of Regulations.

Agency appreciates this comment and will consider the issue of bringing the Guidelines into conformity with the California Style Manual after this rulemaking is closed.

SECTION 15023. Office of Planning and Research (OPR).

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003. Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Defenders of Wildlife, Kim Delfino, October 27, 2003.

Summary: Commenters support the specified changes to this section. Planning and Conservation League Foundation and Defenders of Wildlife also commend the OPR for the existing CEQAnet database.

Response: Agency notes this support of the proposed amendment.

SECTION 15041. Authority to Mitigate.

Agency has withdrawn all proposed amendments to section 15041 in this rulemaking. The following are summaries of comments made regarding the initially proposed amendments to this section. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Section 15041(a)

Name/Date: City of San Diego, Resource Management Division, Lisa F. Wood, October 3, 2003.

Summary: Commenter recognized the proposed changes would significantly differ from the current section.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters contend that this section's preamble expressly limits itself to section 15040 which already contemplates consistency with constitutional and statutory authorities. Commenters suggest that the second sentence of the proposed guidelines be eliminated to reflect this section's preamble.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter recommends that the word "any" be replaced with the word "all" in this section. The sentence would read: "In requiring proposed project changes pursuant to such authority, the lead agency shall act in accordance with *all* applicable constitutional or statutory requirements."

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Commenter requests further explanation as to when Agency believes that principles established by *Nollan v. California Coastal Commission,* 438 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) do not apply and why it believes that regulatory takings law could be perceived to apply only to CEQA.

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003. Sempra Energy, October 27, 2003.

Summary: Commenters urge replacement of "or" with "and" in the second sentence of section 15041(a). The sentence would read: "In requiring proposed project changes pursuant to such authority, the lead agency shall act in accordance with all applicable constitutional *and* statutory requirements."

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter supports deletion of the examples of "nexus" and "rough proportionality" but suggests the following change for the end of subsection (a), "the lead agency shall act in accordance with any applicable constitutional, *decisional*, or statutory requirements."

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters contend that it is appropriate to retain the examples of "nexus" and "rough proportionality" because those examples were upheld by the court in *Communities for a Better Environment et al. v. California Resources Agency* (2002)103 Cal.App.4th 98 (hereinafter, "*Communities for a Better Environment"*), and because they are the most common constitutional standards applicable to mitigation measures. Commenters also urge that the subsection include a reference to decisional requirements, in addition to constitutional or statutory requirements.

SECTION 15062. Notice of Exemption.

Section 15062

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003. Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003.

Summary: Commenters support the changes to this section.

Response: Agency notes this support of the proposed amendments.

Section 15062(a)(2)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that the requirements for describing the location of the project in sections 15062(a)(2) should be consistent with the language in 15082(a)(1)(B), 15085(b)(2), and 15094(b)(1).

Response: In proposed amendments made pursuant to section 11346.8(c) of the Government Code, Agency amended sections 15082(a)(1)(B) and 15094(b)(1) so that the requirements for describing the location of the project in those sections are consistent with the language proposed for this section. In addition, the proposed amendments made pursuant to section 11346.8(c) of the Government Code included changes to section 15085(b)(2) to render it consistent with the changes to this section. As a result, the adopted changes make the requirements for describing project location consistent for all four sections: 15062, 15082, 15085, and 15094.

Name/Date: County Sanitation Districts of Los Angeles County, Felicia A. Ursitti, October 23, 2003.

Summary: Commenter states that the proposed language for describing the location of the project in section 15062(a)(2) should be consistent with section 15124. Section 15124 requires the “precise location and boundaries of the proposed project [to] be shown on a detailed map, preferably topographic,” as well as a depiction on a regional map.

Response: Section 15124 identifies the required contents of the project description in an Environmental Impact Report (EIR). The level of detail required for an EIR project description is far greater than that required in a public notice. Unlike an EIR, the notice of exemption is intended to be a simple, one-page form that serves the purpose of notifying the public that a project is exempt from

CEQA. An EIR typically contains several maps of the project location, putting the project into a regional, local, vicinity, and site context. An EIR also includes a narrative description of the project location, including a description of the site and surrounding land uses. This cannot be done in a one-page Notice of Exemption. For this reason, the language in sections 15062, 15082, 15085 and 15094 simply require a description of "the location of the project" by street address and cross street or a map. This type of description can easily fit in a one-page notice.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter suggests amending the proposed language of subdivision (a)(2) of this section. The proposed language requires identification of a project location by street address in urbanized areas or by attaching a map. Commenter recommends adding language specifying that projects located in rural areas with no street addresses shall be identified by section, township, and range or by attaching a map.

Response: Agency does not believe that the commenter's remarks warrant a change to proposed subsection (a)(2) of this section. Agency believes that marking a project on maps of the size identified in the proposed language (15 minute or 7-1/2 minute U.S.G.S. quadrangle) will be sufficient to identify the location of a project, whether urban or rural, and will allow section, township, and range to be determined.

Section 15062(c)(1) and 15062(c)(2)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that the use of the phrase "shall be" in subdivision (c)(1) and (c)(2) of this section, (which was proposed to be substituted for the word "is") is confusing because it implies that state and local agencies have a mandatory duty to file a Notice of Exemption. Commenter proposes alternative language for (c)(1) and (c)(2): "*If* [an agency] *chooses to file* this notice, the notice of exemption shall be filed. . . ."

Response: Agency does not believe that the commenter's remarks warrant a change to proposed section 15062(c)(1) and 15062(c)(2). Agency disagrees that the proposed language can be construed to impose a mandatory duty to file a Notice of Exemption. Both subdivisions (a) and (c) clearly state that a state agency "may" file such a notice; subdivisions (c)(1) and (c)(2) merely identify where the notice is to be filed.

SECTION 15063. Initial Study.

Agency has withdrawn all proposed amendments to section 15063 in this rulemaking. The following are summaries of comments made regarding the initially proposed amendments to this section. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003. East Bay Regional Park District, Daniel Sykes, October 3, 2003.

Summary: Commenters urge that the proposed scoping meeting requirements should only be required for EIRs and not for Initial Studies and negative declarations. Commenters contend that requiring scoping meetings for Initial Studies and negative declarations is not statutorily authorized, increases lead agency costs, and would lead to additional CEQA litigation.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed revisions to this section but recommend adding a notice requirement to all "persons who reside, work, own, or otherwise occupy property within a 500' radius of the proposed project." Commenters further urge that two notices of the scoping meetings be published in a local newspaper, at intervals of 30 and 7 days prior to the meeting.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter suggests that the proposed scoping amendment be modified to provide that it is not applicable where a lead agency determines to prepare an EIR, without going through the initial study process.

Name/Date: Solano County, James Laughlin, October 27, 2003.

Summary: Commenter urges that this subsection would be more appropriately placed in sections 15082 or 15083 of the Guidelines. Commenter contends that section 15063 generally discusses the preparation of an initial study, prior to the decision whether to prepare an EIR. In contrast, this subsection discusses what a lead agency should do after an Initial Study has been completed and a decision to prepare an EIR has been made.

Name/Date: County of Santa Barbara, Richard A. Kentro, October 27, 2003.

Summary: Commenter contends that lead agencies are already required to "informally" consult with other public agencies as part of the Initial Study process. Commenter states that a negative declaration does not have a scope that is

similar to the scope of an EIR, and therefore a scoping meeting would be held for the purpose of deciding whether to prepare a negative declaration. Commenter believes that the proposed amendment would add considerable time and cost to the preparation of a negative declaration, and would lead decision makers to prepare EIRs in place of negative declarations.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003**.**

Summary: Commenters support the proposed amendment, but suggest that the amendment be changed to specify that notices of scoping meetings be advertised prior to the meeting, and that such notices be advertised in a newspaper of general circulation at least twice before the meeting, at intervals of at least 30 and 7 days prior to such meeting.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter states that the statutory authorization for scoping meetings only applies where a decision to prepare an EIR has been made. Commenter recommends that the proposed amendment be modified to apply only when the preparation of a draft EIR is required (projects of statewide, areawide, or regional significance).

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that the proposed amendment be modified by adding to the list of agencies that are required to receive notice under this subsection, “transportation planning agencies and public agencies which have transportation facilities within their jurisdiction which could be affected by the project.”

Name/Date: Planning Resources, Sandra Genis, October 27, 2003.

Summary: Commenter suggests that the proposed amendment specifically provide that notice of scoping meetings be published in a newspaper of general circulation within any affected community.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Without explaining the reason for its suggestion, commenter suggests the following change to 15063(h)(1)(B): “any responsible agency *that has jurisdiction by law with respect to the projects.*”

SECTION 15064. Determining the Significance of the Environmental Effects Caused By a Project

Section 15064(h).

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter proposes the following change to section 15064(h)(1):

> "Cumulatively considerable" means that the incremental effects of an individual project are significant *which means that the incremental effect of an individual project has discernable significance and consequence and the combined effect results in a substantial adverse effect on the environment, when* viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects. *If the EIR uses existing conditions at the time of the Notice of Preparation as the baseline, the influence of past projects would normally be reflected in that baseline and listing of specific past projects in the EIR is not necessary.*"

Commenter states the following as justification for the proposed change:

> "The original proposal would conflict with the *Communities for a Better Environment* case. The suggested edits try to get at a way to avoid the one molecule issue without resorting to 'drop in the bucket' terminology. The edit… about listing past projects is intended to address a growing problem of some superior court decisions asking for such a list of past projects. While it has not shown up as law of the land yet, it is a disturbing trend that the proposed amendment may be able to help avoid."

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15064. Agency disagrees that the proposed amendment conflicts with *Communities for a Better Environment*. This case invalidated a previously adopted amendment to section 15064 on the ground that the amendment would allow agencies to by-pass the fair argument test by requiring a lead agency to conclude that an effect was not significant if the effect complied with certain regulatory standards. The previous amendment was invalidated because it relieved agencies of the duty of looking at evidence beyond the regulatory standard. This section was upheld in the CBE decision only because it was interpreted to incorporate the fair argument standard. Under the proposed amendment, if there is substantial evidence that the proposed project has effects that are cumulatively considerable (i.e., significant), an EIR must be prepared. This language clarifies that the fair argument standard is applicable to the evaluation of a project's incremental contribution to a cumulative effect where the agency is relying on a previously approved plan or mitigation

program. Agency prefers the language it has proposed to the language proposed by the commenter. The second change suggested by commenter is beyond the scope of this rulemaking. Agency may consider this proposal in future rulemakings.

Name/Date: Bay Area Council, October 24, 2003; Bay Area Council, public testimony by Andrew Michael, September 30, 2003.

Summary: Commenter believes that *Communities for a Better Environment* does not require the proposed amendments. Commenter states that 15064(h)(1) would increase, rather than decrease, public agency uncertainty in addressing the difficult subject of cumulative impacts and states that the proposed amendment of section 15064(h)(1), which changes the term "considerable" to "significant", would add confusion to the CEQA Guidelines. Commenter also contends that the proposed amendment to 15064(h)(3) is not called for by *Communities for a Better Environment.*

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15064. The proposed change is necessary to provide guidance in interpreting the language of section 21083(b)(2) of the Public Resources Code, which provides that "'cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects and the effects of probable future projects." The existing CEQA Guidelines section 15064(h) (as well as section 15065(c)) repeat the same statement and no other provision in CEQA sheds specific light on the meaning of this important language.

Notwithstanding the circular statement in section 21083(b)(2) of the Public Resources Code and existing CEQA Guidelines sections 15064(h) and 15065(c) that "cumulatively considerable" is a "considerable" effect, the conclusion that "cumulatively considerable" means "significant" can be drawn from Public Resources Code section 21083(b) itself. This provision of CEQA instructs Agency, in preparing the guidelines, to specifically identify criteria defining when "a project may have a 'significant effect on the environment.'" One such criterion, set forth in subdivision (b), is that "[t]he possible effects of a project are individually limited but cumulatively considerable." The subdivision goes on to state that the term "cumulatively considerable" means that "the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of current projects, and the effects of probable future projects." Viewed against this backdrop, it is clear that the Legislature, through this statute, intended to convey that a "cumulatively considerable" incremental effect of a project is a significant effect on the environment. This same view is reflected in existing CEQA Guidelines section 15130(a).

Therefore, in determining when incremental effects of an individual project should trigger the EIR requirement in section 15064(h), it is appropriate to consider whether the individually limited effects of the project are significant when considered with the effects of past, current and probable future projects. Regarding section 15064(h)(3), *Communities for a Better Environment* held that the previous version of the Guidelines allowed an agency to by-pass the fair argument test by directing that the effect was not significant and relieving the agency of the duty to look at evidence beyond the regulatory standard. The proposed amendment, taken directly from *Communities for a Better Environment*, clarifies that the fair argument standard applies to the evaluation of a project's incremental contribution to a cumulative effect where the lead agency is relying on a previously approved plan or mitigation program.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter believes that the word "potential" should be used instead of "possible" in 15064(h)(3) to be consistent with CEQA and case law. Commenter also requests that the Guidelines clarify that no EIR is required if potentially significant cumulative effects are reduced below significance.

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15064 since the terms "potential" and "possible" both mean that something may or may not happen. The existing language is written to indicate that if there is a fair argument, based on substantial evidence, of the possibility of a cumulatively considerable effect, then an EIR should be prepared. With respect to commenter's second point, Agency believes that this issue has already been addressed in the Guidelines. Section 15064(h)(2) states: "A lead agency may determine in an initial study that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and is not significant." Section 15064(h)(2) then proceeds to discuss what steps a lead agency must take when a project's contribution will be rendered less than cumulatively considerable through mitigation measures set forth in a mitigated negative declaration. Therefore, Agency believes no change is needed in response to this comment.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters object to the revision of 15064(h)(3) because it discourages use of regional mitigation plans to mitigate environmental impacts. Commenters argue that regional plans usually result in higher quality mitigation measures rather than the piecemeal approach that will result from this amendment. Commenters suggest deletion of the language.

Response: Agency does not believe the commenters' remarks warrant a change to proposed section 15064. Section 15064(h)(3) does not discourage use of regional mitigation plans, but rather clarifies that the fair argument standard applies to the evaluation of a project's incremental contribution to a cumulative effect, even where the lead agency is relying on a previously approved plan or mitigation program. This revision is necessary for consistency with the language and direction of the court in *Communities for a Better Environment*.

Name/Date: California Native Plant Society, Emily B. Roberson, October 24, 2003.

Summary: Commenter states that 15064(h)(3) should be changed to be more consistent with CEQA. Commenter believes that the purpose of CEQA is to reduce impacts to a level below significance rather than to "avoid or substantially lessen" impacts. Therefore commenter proposes that the language be changed to: "…provides specific requirements that will *demonstrably* avoid or *mitigate* the cumulative problem *to a level that is less than significant*."

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15064. The suggested language would amend sections of the existing Guidelines not addressed by this rulemaking effort, and therefore the comment is beyond the scope of this rulemaking. Agency may consider this proposal in connection with future rulemakings**.**

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter believes that the revisions go beyond the intent of *Communities for a Better Environment*, and are confusing and difficult to implement. Commenter recommends revisions to the text of 15064(h)(1), (2), (3) and (4) to help clarify the intent of CEQA with respect to cumulative impacts. These proposed changes are as follows**:**

> (h)(1). "~~When~~ In assessing whether a cumulative effect ~~requires an EIR~~is significant, the lead agency shall consider whether ~~the cumulative impact is significant and whether the effects of the project are cumulatively considerable. An EIR must be prepared if the cumulative impact may be significant and~~ the project's incremental effect, though individually limited, is ~~cumulatively considerable. "Cumulatively considerable" means that the incremental effects of an individual project are considerable~~ nonetheless significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

(h)(1). The last sentence in this subsection reads: "Probable future projects are defined in Section 15130." Metropolitan has concerns about this definition. Please refer to these concerns under our comments for section 15130.

(h)(2). "A lead agency may determine in an initial study that a project's contribution to a significant cumulative impact will be rendered less than cumulatively ~~considerable and thus not~~ significant. When a project might contribute to a significant cumulative impact, but the contribution will be rendered less than cumulatively ~~considerable~~ significant through mitigation measures set forth in a mitigated negative declaration, the initial study shall briefly indicate and explain how the contribution has been rendered less than cumulatively ~~considerable~~ significant."

(h)(3). "A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively ~~considerable~~significant if the project will comply with the requirements in a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the significant cumulative ~~problem~~impact (e.g., water quality control plan, air quality plan, integrated waste management plan) within the geographic area in which the project is located. Such plans or programs must be specified in law or adopted by the public agency with jurisdiction over the affected resources through a public review process to implement, interpret, or make specific the law enforced or administered by the public agency. If there is substantial evidence that the possible effects of a particular project are still cumulatively ~~considerable~~significant notwithstanding that the project complies with the specific plan or mitigation program addressing ~~the~~ that significant cumulative ~~problem~~ impact, an EIR must be prepared for the project."

(h)(4). "The mere existence of significant cumulative impacts caused by other projects alone shall not constitute substantial evidence that the proposed project's incremental effects are cumulatively ~~considerable~~ significant."

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15064. Agency does not agree with commenter's proposed changes, because (among other reasons) they would introduce a new concept, "cumulatively significant" into the Guidelines, which is not defined. Instead, Agency has proposed amendments to section 15064(h)(1) and 15065 to define "cumulatively considerable" as meaning that the incremental effects of an individual project are significant. See response to Bay Area Council, October 24, 2003; Bay Area Council, public testimony by Andrew Michael, September 30, 2003 (above).

In addition, Agency does not agree that Agency's proposed revisions go beyond the intent of *Communities for a Better Environment*. That case invalidated a previously adopted amendment to section 15064 on the ground that the amendment would allow agencies to by-pass the fair argument test by requiring a lead agency to conclude that an effect was not significant if the effect complied with certain regulatory standards. The proposed language clarifies that the fair argument standard applies to the evaluation of a project's incremental contribution to a cumulative effect where the lead agency is relying on a previously approved plan or mitigation program. This proposed language is a clear reference to the fair argument test. See response to Association of Environmental Professionals, Dwight Steinert, October 1, 2003, on this section.

Agency appreciates commenter's suggestions, but prefers the language it has proposed. Therefore, Agency declines to adopt commenter's proposed change to this subdivision. Agency may consider these suggestions in future rulemakings.

Name/Date: Shute, Mihaly & Weinberger, Ellison Folk, October 27, 2003.

Summary: Commenter suggests replacing the word "are" in the proposed amendment to section 15064 (h)(3) ("if there is substantial evidence that the possible effects of a particular project *are* still cumulatively considerable…") with the term "may." Commenter believes this change is critical to the fair argument test.

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15064 as a whole. The proposed language must be read in the context of section 15064, which guides a lead agency in its determination of whether there is substantial evidence supporting a fair argument in light of the whole record that a project may have a significant effect on the environment. Section 15064(h)(3) provides that reliance on a previously approved plan or mitigation program (as described) may lead to the conclusion that there is not such substantial evidence supporting a fair argument. The proposed new language clarifies that if there is substantial evidence that the "possible effects" (a reference to the fair argument standard) of a particular project are still significant notwithstanding compliance with the plan or mitigation program, the lead agency must prepare an EIR for the project. This language is consistent with the direction in *Communities for a Better Environment*.

Name/Date: Solano County, James Laughlin, October 27, 2003.

Summary: Commenter asserts that the changes proposed in this section would be more appropriate in section 15065. Section 15064 focuses on assistance to the lead agency in determining whether a particular environmental impact is significant. Commenter states that because the Legislature has already declared

that a cumulative impact is per se significant, lead agencies may determine only whether the impact is cumulatively considerable. Section 15065 provides guidance as to mandatory findings of significance which would be a more appropriate location for this amendment. In addition, the commenter suggests revising the definition of "cumulatively considerable" reflected in Item XVII(b) of Appendix G.

Response: As noted in Agency's response to the October 24, 2003 comments by the Bay Area Council, the proposed change is necessary to provide guidance in interpreting "cumulatively considerable," and, in the context of section 21083, that defining "cumulatively considerable" as "significant" is an appropriate interpretation of the statute to effectuate the Legislature's intent. Commenter is incorrect in stating that the Legislature has already declared that a cumulative impact is per se significant; rather, section 21083 provides that a project may have a significant effect on the environment if the possible effects of a project are "cumulatively considerable." Agency disagrees that the amendment to this section should be made only to section 15065. The amendment in section 15064(h)(1) is necessary for consistency with section 15065, and the amendment to 15064(h)(3) follows the direction of *Communities for a Better Environment* and preserves the application of the fair argument standard as the court directed.

Agency does not believe the commenter's remarks warrant a change to proposed section 15064. The suggested amendment of Appendix G is not addressed directly by the specific amendment of section 15064 proposed by Agency. Because it is outside the scope of the proposed amendments, Agency may consider the suggested amendment in connection with future rulemaking.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed revision to this section. Commenters suggest revised language to the first sentence of subdivision (h)(3): "A lead agency may determine that a project's contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program which provides specific requirements that will *clearly* avoid or limit *to less-than-significant levels* the cumulative problem…."

Response: Agency does not believe the commenters' remarks warrant a change to proposed section 15064. The proposed amendments are outside the scope of this rulemaking. Agency may consider this suggestion in future rulemakings.

SECTION 15064.5. Determining the Significance of Impacts on Historical and Unique Archeological Resources.

Agency has withdrawn its proposed amendments to section 15064.5. An identical revision is proposed for 15126.4(b)(3)(C) and Agency has responded to comments on the proposed language in 15126.4(b)(3)(C). The following are summaries of comments made regarding the initially proposed amendments to section 15064.5. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Section 15064.5 (c)(5).

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter suggests deleting the proposed language pertaining to curation, excavation and testing.

Name/Date: Best, Best &Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter agrees that addition of curation as a mitigation measure is a good change and would like to see additional detail for types of curation.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters express general support for the amendment, but suggest that curation and other similar means of mitigation should apply not only when an artifact is removed, but also when an artifact is impacted.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter questions whether the term "curation" includes analysis and reporting.

Name/Date: Carmen Lucas, October 2, 2003. Native American Heritage Commission, Larry Myers, October 2, 2003. Save Our Heritage Organization, Bruce Coons, October 20, 2003. San Diego Archeological Center, Tim Gross, October 24, 2003. Carmen Lucas and San Diego Archeological Center, public testimony of Courtney Coyle, October 6, 2003.

Summary: Commenters support the amendment to add curation as a possible mitigation measure.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter requests clarification of the amendment adding curation as a possible mitigation measure and offers additional language that would limit curation to instances where the artifact is "determined to be a unique archaeological resource."

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Planning and Conservation League Foundation, public testimony by Mary U. Akens, September 30, 2003.

Summary: Commenters are unsure of the purpose and the appropriate location of the amendment adding curation as a possible mitigation measure.

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter states that the proposed amendment permitting curation as appropriate mitigation should be withdrawn. Commenter states that if this language is to be added, it should be added to section 15126.4. Additionally, commenter states that any reference to curation in the Guidelines should also address analysis and reporting of the excavation and its results.

Name/Date: Natural Resources Defense Council, Jan Chatten-Brown, October 27, 2003.

Summary: Commenter is concerned that addition of curation language to this section "may be interpreted to mean that curation reduces the level of significance of an otherwise significant impact to a level of insignificance, not requiring preparation of an EIR, or, if an EIR is otherwise prepared, not requiring the selection of feasible alternatives or other feasible mitigation measures."

SECTION 15065. Mandatory Findings of Significance.

Name/Date: Alison Anderson, October 27, 2003.

Summary: Commenter makes four general statements regarding proposed section 15065 and concludes the proposed amendment "weakens" CEQA. Commenter contends specifically : (1) while the proposed amendment to section 15065 states that an EIR is required where "there is substantial evidence in light of the whole record" that specified conditions may occur, the "lack of information" should also "trigger" the obligation to prepare an EIR pursuant to section 15065; (2) amending section 15065 to address the potential for "substantial" reduction in number or restriction in range of endangered, rare or threatened species and their habitat "weakens" CEQA; (3) "there should not be any further take allowed

for sensitive species and sensitive communities and no project should be permitted if it substantially reduces the number or range of listed and rare species under any circumstances," and (4) that "[t]here should not be statements of overriding considerations [under CEQA] because nothing overrides the environment."

Response: Agency does not believe the commenter's statements warrant a change to the proposed amendment. Three of the four statements by the commenter do not address directly the specific amendment of section 15065 proposed by Agency. Commenter's first, third and fourth statements numbered above each call for other possible amendments of section 15065 and CEQA generally. As noted in Agency's introduction, whenever Agency receives comments that do not address Agency's proposed amendments, Agency deems such comments to be beyond the scope of the proposed rulemaking and has made no change.

Commenter's second statement as numbered above in the comment summary is specific to the proposed action by Agency. Commenter contends amending section 15065 to address the potential for "substantial" reduction in number or restriction in range of endangered, rare or threatened species "weakens" CEQA. In so doing, the commenter expresses an opinion about the overall effect of the proposed amendment.

Agency does not agree with this comment. Rather, the proposed amendment clarifies the application of an important part of the mandatory findings of significance.

In order to understand the reason such a clarification is needed, it is helpful to understand the statutory background. In general, sections 21083 and 21087 of the Public Resources Code direct Agency, with the assistance of OPR, to certify and adopt certain mandatory findings of significance as part of the CEQA Guidelines. Public Resources Code section 21083 states, in pertinent part, that:

> "(b) The guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a "significant effect on the environment." The criteria shall require a finding that a project may have a "significant effect on the environment" if any of the following conditions exist:
>
> "(1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
>
> "(2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, "cumulatively considerable" means that the incremental effects of an individual project

> are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
>
> "(3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly."
>
> (Pub. Resources Code, § 21083, subd. (b).)

In enacting this section, the Legislature indicated its intent that certain types of projects were so likely to have significant impacts on the environment that the related significance determinations should not be left in the first instance to the discretion of the lead agency. In contrast, for example, the Legislature directed Agency to identify in the CEQA Guidelines classes of projects that do not normally result in significant effects on the environment. (See *id.*, § 21084.) The mandatory findings of significance, in this respect, reflect legislative intent that certain types of impacts resulting from proposed projects are almost always significant.

Agency complied with direction in section 21083 to provide for mandatory findings of significance in certain circumstances by promulgating section 15065 of the CEQA Guidelines. Sections15065(a) and (b) of the CEQA Guidelines closely track the language in section 21083(a)(1). For example, section 21083(a)(1) requires a mandatory finding of significance relating to "potential to degrade the quality of the environment," and section 15065(a) refers to a project that has the "potential to substantially degrade the quality of the environment." Section 21083(a)(1) refers to achieving "short-term, to the disadvantage of long-term, environmental goals," and section 16065(b) refers to a project that has "the potential to achieve short-term environmental goals to the disadvantage of long-term environmental goals."

However, where section 21083(b) refers to projects with the potential to "curtail the range of the environment," section 15065(a) refers to projects with the potential to "substantially reduce the habitat of fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of an endangered, rare or threatened species, or eliminate important examples of the major periods of California history or prehistory." (CEQA Guidelines, § 15065(a).) This language represents a significant elaboration of the statutory "curtail the range" language. Moreover, each of the criteria in section 15065(a) quoted above may be subject to further interpretations by lead agencies.

In recent years, Agency has become concerned that the "reduce the number or restrict the range" language in section 15065(a) is susceptible to an overbroad interpretation that does not appropriately reflect the meaning of the statutory language. Specifically, the "reduce the number or restrict the range" language in

existing section 15065 could be interpreted to require preparation of an EIR whenever there is substantial evidence supporting a fair argument in light of the whole record that the proposed project has the potential to "take" a single individual or any habitat of an endangered, rare or threatened species. (Fish & G. Code, § 86 ("take" defined).) Indeed, this argument is heard with increasing frequency by a growing number of state and local agencies in California.

There is at present no guidance from the Administration correcting this misinterpretation of section 15065(a). There is currently no provision in the CEQA Guidelines, including section 15065, that provides specific guidance regarding the "reduce the number or restrict the range" language in the Guideline's mandatory findings of significance. The same is true of Agency's "Discussion" of CEQA Guidelines section 15065. [1] Likewise, Agency is not aware of any administrative agency rule, regulation or policy interpreting the "reduce the number or restrict the range" language in section 15065, including from the Department of Fish and Game, the State's trustee agency for fish and wildlife resources. (Fish & Game Code, § 1802.)

Guidance from the judiciary regarding the existing "reduce the number or restrict the range" language is also limited. However, judicial decisions have interpreted the Guidelines as applying in an extremely broad range of circumstances and could be used to support an interpretation of "reduce the number or restrict the range" as applying to the potential to take a single individual, particularly in conjunction with CEQA's "fair argument standard." In *Mira Monte Homeowners Assoc. v. Ventura County* (1985) 165 Cal.App.3d 357, the Second Appellate District addressed the mandatory findings of significance as set forth in section 15065 in the Guidelines and concluded the lead agency abused its discretion under CEQA by failing to prepare subsequent or supplemental environmental review. Relying on the Guidelines, the court concluded CEQA required such additional analysis because of a previously undisclosed encroachment of approximately 0.25 acre by the project into a wetlands area that provided habitat for a rare plant species. (*Id.* at pp. 363-365.) "By definition[,]" the court remarked, "that unaddressed encroachment involved a new significant effect because it eliminated a portion of the wetlands thereby restricting the range of a rare or endangered plant." (*Id.* at p. 364, citing CEQA Guidelines, § 15065, subd. (a).) Likewise, the court concluded, because the new significant impacts involved the mandatory findings of significance, the lead agency's "imposition of additional conditions and its administrative findings regarding mitigation did not cure the [lead agency's] failure to proceed as required by law." (*Mira Monte*, *supra*, 165 Cal.App.3d at p. 365.)

The decision in *Mira Monte* is notable because it relied on the Guidelines to equate the term "range" as identified in section 15065(a) with the concept of

[1] Agency "Discussion" of CEQA Guidelines section 15065 can be found at http://ceres.ca.gov/ceqa.

"habitat." The decision is also notable because the court concluded the Guidelines' mandatory findings of significance applied "by definition" even with a relatively small encroachment on a wetlands area that arguably provided habitat for rare plants. The decision underscores, in this sense, that application of the "reduce the number or restrict the range" language in the mandatory findings is subject to a very low threshold.

The California Supreme Court echoed similar sentiment in dicta. (See *Mountain Lion Foundation v. Fish and Game Comm.* (1997) 16 Cal.4th 105, 124 (in holding a categorical exemption inapplicable under CEQA for purposes of "delisting" under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), the court invoked CEQA Guidelines section 15065(a) and stated that the mandatory findings control whenever a project creates the "potential for population reduction or habitat restriction"); see also *San Bernardino Valley Audubon Society v. Metropolitan Water Dist*. (1999) 71 Cal.App.4th 382, 401-402, fn. 10 (underscoring the threshold to trigger the existing "reduce the number or restrict the range" language in the mandatory findings is extremely low, particularly in conjunction with CEQA's fair argument standard).)

Such a broad interpretation of this portion of the mandatory findings goes too far beyond the reasonable scope of the statutory language regarding projects that may "curtail the range of the environment." (See Pub. Resources Code, § 21083, subd. (b)(1).) There is no evidence that the Legislature intended to require a mandatory finding of significance for projects that do not raise the specter of lasting, long term significant impacts in the majority of circumstances. The language of section 21083(b) of the Public Resources Code does not suggest that there should be a mandatory finding of significance for a project that may involve "take" of a single individual of an endangered, rare or threatened species, or the potential loss of any amount of habitat for such species, regardless how minimal. These types of projects are not so likely to have a significant effect that the Legislature would have intended to require a mandatory finding of significance under all such circumstances.

The addition of the word "substantially" in the proposed amendment of CEQA Guidelines section 15065(a) tempers appropriately the existing "reduce the number or restrict the range" language in the mandatory findings of significance to make it more consistent with the language in Public Resources Code section 21083. With the amendment, for example, public agencies will have to exercise their discretion under CEQA and determine whether an EIR is required because the proposed project has the potential to substantially reduce the number or substantially restrict the range of an endangered, rare or threatened species. Consistent with existing law, public agencies will make this determination against the backdrop of the "fair argument standard." (See generally Pub. Resources Code, § 21080, subd. (c); CEQA Guidelines, § 15070, subd. (a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) An EIR will be required, as a result, whenever substantial evidence supports a fair argument that a proposed

project may have a significant effect on the environment because the proposed project has the potential to substantially reduce the number or substantially restrict the range of an endangered, rare or threatened species. Public agencies will have to make this determination in light of the whole record.

In short, Agency does not believe addition of the word "substantially" in CEQA Guidelines section 15065(a) "weakens" CEQA. Rather, proposed section 15065(a)(1) implements more accurately statutory direction in section 21083(b)(1) of the Public Resources Code regarding projects with the potential to "curtail the range of the environment." The proposed amendment also clarifies existing confusion and debate regarding the "reduce the number or restrict the range" language in CEQA Guidelines section 15065, and the proposal, just like the existing mandatory findings, effectuates CEQA's policy goals of environmental protection and informed public decision making.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Commenter is opposed to proposed section 15065. Commenter contends the proposed amendments "could be misconstrued" because adherence to a natural community conservation plan (NCCP) or habitat conservation plan (HCP) "does not necessarily result in a project with no significant environmental impacts[,]" particularly because "HCPs and NCCPs negatively impact farms and ranches[.]" In so doing, the commenter suggests proposed section 15065 would do away with CEQA's "fair argument standard" and required preparation of an EIR in all instances where a project proponent is implementing an approved NCCP or HCP. Commenter recommends, as a result, that proposed section 15065 "drop the reference to NCCPs and HCPs."

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15065. Proposed section 15065(b), which includes the reference to NCCPs and HCPs, is limited by its own terms to impacts subject to proposed section 15065(a). Proposed section 15065(b) provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b), however, a lead agency must still decide – consistent with existing law – whether the proposed project, even as revised, may have a significant impact on the environment. Accordingly, where substantial evidence supports a fair argument that a proposed project may result in a significant impact on the environment, including impacts under proposed section 15065(a), an EIR may be required even if the project proponent is obligated to implement project changes or mitigation measures pursuant to an approved NCCP or HCP. Agency disagrees, as a result, with the commenter's suggestion that proposed section 15065 would do away with the "fair argument standard."

Moreover, the commenter's suggestion that proposed section 15065 would do away with the requirement to prepare an EIR in all instances where a project proponent is implementing an approved NCCP or HCP indicates some misunderstanding. An EIR is not currently required in all instances where a project proponent is implementing an approved NCCP. With respect to an HCP, an Environmental Impact Statement (EIS) is generally prepared by the federal resource agency that is issuing the incidental take permit. An EIR would not have to be prepared unless a state agency were required to approve some aspect of the HCP. Agency does not believe references in proposed section 15065 to NCCPs and HCPs should be deleted.

Name/Date: Department of Transportation, State of California, Gary R. Winters, October 27, 2003.

Summary: Commenter supports proposed section 15065. Commenter also remarks that a definition of "substantially" would be helpful. In addition, the commenter recommends adding a requirement as section 15065(2)(D) "where the project proponent shall obtain an incidental take permit from the Department of Fish and Game for the subject endangered, rare, or threatened species."

Response: With respect to the commenter's suggestion that a definition of the word "substantially" would be helpful, Agency believes no change to the proposed action is warranted. The word "substantially" appears in the existing mandatory findings in multiple places and the word "substantial" appears in various other provisions of the CEQA Guidelines. Agency believes it is appropriate for public agencies to exercise their discretion under CEQA to consider whether an individual project has the potential to substantially impact the environment. (See, e.g., CEQA Guidelines, §§ 15065, subd. (a), 15382.)

Agency also believes no change is warranted to the proposed action in response to the commenter's remarks regarding incidental take permits issued by the Department of Fish and Game under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.). (See generally *Id.*, § 2081, subd. (b).) Commenter's remarks appear to recommend the mandatory findings include a statement requiring project proponents to obtain an incidental take permit where a project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species. Agency does not believe permitting obligations under CESA are the proper subject of the CEQA Guidelines, particularly the mandatory findings of significance. (See Pub. Resources Code, § 21083, subd. (b).) Agency also emphasizes that the potential to substantially reduce the number or restrict the range of endangered, rare or threatened species is a determination distinct from whether an activity will result in "take" under CESA thereby triggering the need for an INCIDENTAL TAKE PERMIT from the Department of Fish and Game. (See, e.g., Fish & G. Code, § 86 ("take" defined).)

Name/Date: Natural Resources Defense Counsel, Jan Chatten-Brown, October 27, 2003.

Summary: In general, the commenter objects to the proposed amendment of section 15065 as "extremely troublesome." Commenter objects to the addition of the word "substantially" in proposed section 15065(a)(1) as adding "new uncertainty" and as contrary to the "original intent" underlying existing section 15065(a). Commenter also suggests as an apparent alternative to proposed section 15065(a)(3) that a definition of "considerable" be added to the CEQA Guidelines. Finally, the commenter objects to proposed section 15065(b)(2)(C)(2) as "too permissive" and "beyond the authority" of Agency.

Response: Agency does not believe the commenter's statements regarding proposed sections 15065(a)(1) and 15065(a)(3) warrant changes to proposed section 15065. With respect to the commenter's remarks regarding proposed section 15065(b)(2)(C)(2), Agency revised the proposed section to address the commenter's concerns and other similar concerns expressed by various other commenters. Proposed section 15065(b)(2)(C)(2) now reads, "2. such requirements preserve, restore, or enhance sufficient habitat to mitigate the reduction in habitat ~~or~~ *and* number of the affected species to below a level of significance." Agency also made a similar change to proposed section 15065(b)(2)(C)(1). These changes further support Agency's conclusion that projects meeting these criteria are not of the sort that are so likely to have a significant effect that the Legislature would have intended to require a mandatory finding of significance under all circumstances. In this respect, proposed section 15065(b)(2)(C) as revised is consistent with controlling law, and it is reasonably necessary to effectuate the purposes of CEQA. (See Gov. Code, § 11342.2.) The proposed amendment also constitutes a permissible exercise of Agency's discretion relative to the CEQA Guidelines. (Pub. Resources Code, § 21083.) Agency disagrees as a result that proposed section 15065(b)(2)(C) is "beyond the authority" of Agency.

In contrast, Agency does not believe addition of the word "substantially" in the proposed amendment of section 15065 "adds new uncertainty" to the mandatory findings of significance. The word "substantially" already appears in multiple places in existing CEQA Guidelines section 15065(a). Thus, Agency does not believe adding one more reference to a subdivision of the mandatory findings that already uses the word in two other places adds uncertainty to the section. Likewise, Agency disagrees with the commenter's implied suggestion that addition of the word "substantially" renders uncertain the effect of the "reduce the number or restrict the range" language in section 15065 of the CEQA Guidelines.

Proposed section 15065(a)(1) requires preparation of an EIR whenever, among other reasons, "there is substantial evidence, in light of the whole record," that a project "may . . . . [¶] substantially reduce the number or restrict the range of an endangered, rare or threatened species[.]" Whether a proposed project has the

potential for such impacts in a given instance will depend, of course, on the specific circumstances surrounding each individual project. This fact, however, does not render the word substantially, the "reduce the number or restrict the range" language, or the mandatory findings of significance uncertain. Indeed, whether an individual project has the potential in the first instance for impacts on endangered, rare or threatened species is a fact-specific determination that each lead agency will need to address against the backdrop of CEQA's "fair argument standard." (See generally *Laurel Heights Improvement Assoc. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123; *No Oil. Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002.) In Agency's view, requiring lead agencies to exercise their discretion and determine whether a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species is entirely appropriate and consistent with existing law.

Agency also disagrees with the commenter's suggestion that proposed section 15065(a)(1) should be abandoned because it runs counter to the "original intent" underlying existing section 15065(a). According to the commenter, "the original intent . . . seems to be that the elimination of an individual of any endangered, rare or threatened species is significant" under CEQA. The original intent underlying existing section 15065(a) (which may or may not be the "original intent' described by the commenter) is not determinative. As explained above in Agency's response to Ms. Alison Anderson's comments dated October 27, 2003, proposed section 15065 is consistent with the statutory charge in section 21083(b)(1) of the Public Resources Code. For the same reason, Agency concludes that no change to proposed section 15065(a)(1) is necessary.

Finally, Agency does not believe the commenter's observation that a definition of the word "considerable" would be "useful" in the CEQA Guidelines warrants a change to the proposed action. The suggestion is not specific to the proposed action.

Name/Date: Shute, Mihaly & Weinberger LLP, Ellison Folk, October 27, 2003.

Summary: Commenter contends the "proposed amendments [to CEQA Guidelines section 15065] include a number of changes that are not consistent with the statute, specifically, Public Resources Code section 21083(b)."

Response: Agency believes no change to proposed section 15065 is warranted by the commenter's remark. As explained in Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003, the proposed changes to the mandatory findings of significance are consistent with CEQA and section 21083(b) of the Public Resources Code.

Name/Date: Sustainable Conservation, Bob Neale, October 27, 2003**.**

Summary: Commenter supports proposed section 15065.

Response: Agency notes this support of the proposed amendments**.**

Section 15065(a)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter contends reference to "substantial evidence, in light of the whole record" in proposed section 15065(a) is "confusing" and the proposed language should be revised to more specifically "encompass the fair argument concept." Commenter suggests the proposed section be revised to state: ". . . where there is substantial evidence, in light of the whole record, *to support a fair argument* that any of the following conditions may occur . . . ."

Response: Agency does not believe the change recommended by the commenter is warranted. Commenter's suggested revision of proposed section 15065(a) is based on the contention that reference to "substantial evidence, in light of the whole record" could be interpreted to "overrule application of the fair argument standard[,]" which governs required preparation of EIRs under CEQA. (See generally *Laurel Heights Improvement Assoc. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002. Agency disagrees. The proposed addition of language referring to "substantial evidence, in light of the whole record[,]" coupled with use of the word "may" in existing section 15065(a), is entirely consistent with statutory language articulating the standard governing required preparation of an EIR. Public Resources Code section 21080, subdivision (d), provides, in particular, "[i]f there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared." (See also Pub. Resources Code, 21100, subd. (a), 21151, subd. (a).) Proposed section 15065(a) is entirely consistent with this statutory directive and Agency does not believe the proposed amendment is confusing or that it contradicts case law.

Name/Date: California Native Plant Society, Emily B. Roberson, October 24, 2003.

Summary: Commenter supports addition of the word "may" and the phrase "substantial evidence in light of the whole record" in proposed section 15065(a). Commenter is opposed to addition of the word "substantially" in proposed section 15065(a)(1) as "illegal." Commenter contends proposed section 15065(a)(1) is "ambiguous and open to interpretation," contrary to "the legislative intent of CEQA," and "inconsistent with CEQA's requirement that an EIR must be

prepared if a project may have a significant impact on the environment." In the commenter's view, the proposed amendment is inconsistent with standards governing required preparation of an EIR because "population loss" of any kind makes "species extinction more likely." Likewise, the commenter contends the proposed amendment is inconsistent with controlling standards because "a project may easily fail to substantially reduce the number or range of an endangered species, [and it] could even conceivably fail to adversely affect [the species'] genetic diversity, while still creating an 'adverse change' in the 'area which will be affected by the proposed project' by extirpating the species from the project area or substantially reducing its numbers or diversity within the project area."

Response: With respect to the commenter's remarks regarding proposed section 15065(a)(1), Agency believes addition of the word "substantially" in proposed section 15065(a)(1) is legal and that no change to proposed section is warranted. Agency also believes the commenter's remarks do not warrant a change to proposed section 15065(a)(1) for the reasons set forth in response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003. The portion of that response addressing the interplay between the legal requirements imposed by section 21083(b)(1) of the Public Resources Code, and the CEQA Guidelines' mandatory findings of significance is particularly relevant to the present commenter's remarks.

Agency believes no change to proposed section 15065(a)(1) is warranted for other reasons. Commenter appears to oppose addition of the word "substantially" in proposed section 15065(a)(1) because its meaning is "open to interpretation by project proponents, lead agencies and local officials." Agency does not believe this point renders proposed section 15065(a)(1) illegal. Likewise, Agency believes the issue of whether a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species is a determination that lies appropriately with individual state and local agencies. As the CEQA Guidelines underscore, "[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the pubic agency involved, based to the extent possible on scientific and factual data." (CEQA Guidelines, § 15064, subd. (b).) Indeed, "[a]n iron clad definition of a significant effect is not always possible because the significance of an activity may vary with the setting." (*Ibid.*; see also *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1353.) This is particularly true today where individual projects often incorporate design elements, mitigation measures and alternatives to avoid or substantially lessen potentially significant impacts on the environment, or where individual projects evolve against the backdrop of approved regional habitat conservation plans or natural community conservation plans that conserve endangered, rare or threatened species and their habitat. In Agency's opinion, public agencies should be able to exercise their discretion under CEQA to consider these types of factors and other project specific details as they

determine whether an individual project has the potential to substantially reduce the number or restrict the range of endangered, rare or threatened species.

Agency also disagrees with the commenter that addition of the word "substantially" to proposed section 15065(a)(1) is illegal because it "undermine[s] legislative intent" in section 21001(c) of the Public Resources Code. This provision of CEQA codifies State policy to "[p]revent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history." (Pub. Resources Code § 21001(c).) Agency views the "reduce the number or restrict the range" language in existing CEQA Guidelines section 15065(a) as an extension of this policy statement. Yet, Agency disagrees that this provision of CEQA prohibits addition of the word "substantially" in proposed section 15065(a)(1).

Section 21001(c) of the Public Resources Code speaks in broad terms regarding the need to prevent the elimination of fish and wildlife species, to insure self-perpetuating populations of fish and wildlife, and to preserve plant and animal communities. In contrast, nothing in section 21001 requires the CEQA Guidelines to compel a public agency determination that the potential to "take" a single individual or result in the loss of any habitat of an endangered, rare or threatened species is a significant effect on the environment under CEQA. Stated another way, section 21001(c) of the Public Resources Code does not require preparation of an EIR whenever a project has the potential to affect an endangered, rare or threatened species. Moreover, as Agency explained in response to comments by Alison Anderson, to the extent CEQA requires the CEQA Guidelines to compel a finding of significance in certain circumstances, the relevant statutory provision is section 21083(b)(1) of the Public Resources Code.

The policies codified in section 21001(c), as a result, merely inform the more specific statutory directive in section 21083(b)(1) of the Public Resources Code. They do not compel a particular conclusion by Agency as to the significance of particular impacts or direct the Agency in a particular fashion as to whether the word "substantially" is an appropriate modifier of the "reduce the number or restrict the range" language in the mandatory findings of significance. The latter is particularly true, in fact, because the statutory provision directly on point speaks in terms of projects with the potential to "curtail the range of the environment." (Pub. Resources Code, § 21083, subd. (b)(1).) As a result, Agency disagrees with the contention that Public Resources Code section 21001, subdivision (c), precludes proposed CEQA Guidelines section 15065(a)(1) as a matter of law.

Agency also does not believe proposed section 15065(a)(1) runs counter to policies codified in section 21001(c) of the Public Resources Code. Once again,

this statutory provision speaks in broad terms regarding the need to prevent the elimination of fish and wildlife species, to insure self-perpetuating populations of fish and wildlife, and to preserve plant and animal communities. In contrast to the commenter, Agency does not believe projects with the mere potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species will necessarily eliminate a fish or wildlife species, undermine a self-perpetuating population of fish or wildlife, or prevent the preservation of a plant or animal community. As noted above, many projects today are designed with modifications and built-in mitigation measures to address the prospect of adverse impacts on special status species. Many projects also evolve against the backdrop of regional conservation plans designed and approved to conserve endangered, rare or threatened species. In Agency's view, these design modifications, mitigation measures, and approved conservation plans could support agency conclusions that potentially significant effects on endangered, rare or threatened species are avoided or mitigated to a point where clearly no significant effect on the environment would occur. Likewise, these mitigation measures could support related agency determinations that there is no substantial evidence in light of the whole record that the project may have a significant effect on the environment. (See generally Pub. Resources Code, § 21080, subd. (c)(2).) Each public agency must reach its own conclusion, of course, in the exercise of its discretion, but any such exercise must be informed by the broad policies codified in section 21001(c) of the Public Resources Code. In this respect, Agency does not believe proposed section 15065(a)(1) undermines legislative intent codified in section 21001(c) of the Public Resources Code.

Finally, Agency disagrees proposed section 15065(a)(1) is "inconsistent with CEQA's requirement that an EIR must be prepared if a project may have a significant impact on the environment." Commenter first contends addition of the word "substantially" in proposed section 15065(a)(1) is inconsistent with standards governing required preparation of an EIR because "population loss" makes species "extinction more likely." In essence, the commenter contends, because population loss makes extinction more likely, where a project has the potential to "take" an endangered, rare or threatened species, an EIR must always be prepared under CEQA's "fair argument" standard. Commenter also goes one step further and contends Agency may not add the word "substantially" in proposed section 15065(a)(1). As explained above, Agency disagrees that a project with the potential to "take" an endangered, rare or threatened species has the potential in all instances to result in a significant effect on the environment. More important, Agency finds no basis in law to require the CEQA Guidelines to compel such a conclusion in all instances.

Commenter contends addition of the word "substantially" in proposed section 15065(a)(1) is inconsistent with standards governing required preparation of an EIR for one last reason. According to the commenter, "a project may easily fail to substantially reduce the number or range of an endangered species, [and it]

could even conceivably fail to adversely affect [the species'] genetic diversity, while still creating an 'adverse change' in the 'area which will be affected by the proposed project' by extirpating the species from the project area or substantially reducing its numbers or diversity within the project area." This argument is a variation on the commenter's contentions addressed in the preceding paragraph. Once again, the commenter believes, because the potential loss of any individual endangered, rare or threatened species is always a significant effect on the environment, addition of the word "substantially" in proposed section 15065(a)(1) is barred by CEQA's "fair argument" standard. As explained above, Agency disagrees. Agency emphasizes, even with the proposed amendments to section 15065, a public agency could determine in the exercise of its discretion that an EIR is required for the reasons advanced by the commenter.

Name/Date: County Sanitation Districts of Los Angeles County, Felicia A. Ursitti, October 23, 2003.

Summary: Commenter opposes reference to the "whole record" in proposed section 15065(a). Commenter contends the proposed addition is "inconsistent" with section 21064.5 of the Public Resources Code, and that significance determinations for mitigated negative declarations "should not be made in light of the 'whole record.'"

Response: Agency believes no change to proposed section 15065(a) is warranted by the commenter's remarks. Pursuant to existing law, the adequacy of a mitigated negative declaration, including the underlying significance determinations, is governed by the issue of whether substantial evidence in light of the "whole record" before the public agency supports a fair argument that the project, as revised or mitigated, may have a significant effect on the environment. (See, e.g., Pub. Resources Code, §§ 21064.5, 21080, subd. (c)(2).) Similarly, if there is substantial evidence in light of the "whole record" that a project may have a significant effect on the environment an EIR must be prepared. (*Id.*, § 21080, subd. (d).) Commenter's remarks regarding the reference to the "whole record" in proposed section 15065(a) are not consistent with existing law.

Name/Date: Sandra L. Genis, October 27, 2003

Summary: Commenter recommends the following change to proposed section 15065(a):

> (a) A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project ~~where there is substantial evidence, in light of the whole record,~~ *whenever it can be fairly argued on the basis of substantial evidence, regardless of whether other substantial evidence supports the opposite conclusion,* that any of the following conditions may occur:

The recommended change is necessary according to the commenter because: (1) proposed section 15065(a) "could be interpreted to place a greater burden of proof on parties requesting preparation of an EIR"; and (2) proposed section 15065(a) "directly conflicts with *Community for a Better Environment* which requires preparation of an EIR 'whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact, *regardless of whether other substantial evidence supports the opposite conclusion*' not just when evidence of a potential impact is viewed 'in light of the whole record' and balanced accordingly." (Emphasis in original.)

Response: Agency believes no change to proposed section 15065(a) is warranted by the commenter's remarks. Agency disagrees that proposed section 15065(a) places a greater burden of proof on parties requesting preparation of an EIR. The reference in proposed section 15065(a) to "substantial evidence in light of the whole record" is entirely consistent with controlling statutory authority. (See Pub. Resources Code, §§ 21080, subd. (d), 21082.2; see also CEQA Guidelines, § 15064, subds. (a)(1), (f)(1).) Controlling case law also addresses the issue in the same terms. (See, e.g., *Laurel Heights Improvement Assoc. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d. 68, 75.) For further detail, please also see Agency's response to comments regarding proposed section 15065(b) by Emily B. Roberson of the California Native Plant Society dated October 24, 2003.

Agency also disagrees the "substantial evidence in light of the whole record" language in proposed section 15065(a) "directly conflicts" with the court's decision in *Communities for a Better Environment*. Commenter quotes correctly the court's statement regarding CEQA's "fair argument" standard, but overlooks the legal authority cited by the court to support its comments. (*Id.* at pp. 106-107, fn. 8, citing Pub. Resources Code, §§ 21100, 21151, 21080, subd. (d), 21082.2, subd. (a); *Laurel Heights Improvement Assoc.*, *supra*, 6 Cal.4th at p. 1123; *No Oil, Inc.*, *supra*, 13 Cal.3d at pp. 75, 84; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3rd 988, 999, 1002; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 880.) The authority, some of which is mentioned in the preceding paragraph, specifically casts CEQA's "fair argument" standard against the backdrop of substantial evidence in light of the whole record. Proposed section 15065(a) is consistent with the authority cited by the court and no change to the proposed action is warranted by the commenter's remarks.

Name/Date: San Joaquin Raptor Rescue Center, Lydia Miller, and Protect Our Water, Steve Burke, October 27, 2003.

Summary: Commenters object to the "substantial evidence in light of the whole record" language in proposed section 15065(a). According to the commenters,

the "language would create an inappropriately restrictive context for the determination of substantial evidence, and [it] should be deleted."

Response: Agency believes no change to proposed section 15065(a) is warranted by the commenters' remarks. See Agency's response to comments regarding proposed section 15065(a) by Sandra L. Genis dated October 27, 2003.

Name/Date: Shute, Mihaly & Weinberger LLP, Ellison Folk, October 27, 2003

Summary: Commenter contends proposed section 15065(a) "should specifically" incorporate CEQA's "fair argument" standard as opposed to merely implying the standard applies through use of the word "may."

Response: Agency believes no change to proposed section 15065(a) is warranted by the commenter's statement. As the commenter notes, proposed section 15065(a) is consistent with CEQA's "fair argument" standard. Indeed, the proposed section is entirely consistent with statutory language long understood to codify the "fair argument" standard. (See, e.g., Pub. Resources Code, §§ 21080, subds. (c) and (d).) In this regard, Agency believes proposed section 15065(a) is cast in terms underscoring "that the [fair argument] standard clearly applies . . . ."

Section 15065(a)(1)

Name/Date: Bay Area Council, October 27, 2003. Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003. California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters support proposed section 15065(a)(1).

Response: Agency notes this support of the proposed amendment.

Name/Date: Environmental Defense Center, Linda Krop, October 6, 2003**.**

Summary: Commenter contends addition of the word "substantially" in proposed section 15065(a)(1) "inappropriately inserts a vague requirement and fails to acknowledge that any reduction in the number or restriction in the range of a listed species may jeopardize its survival or ability to recover." (Emphasis in original.) Commenter also remarks, "Rather than provide the certainty intended" by the mandatory findings of significance, "this proposed change will lead to uncertainty and render the section meaningless."

Response: Agency believes no change to proposed section 15065(a)(1) is warranted by the commenter's remarks. Agency disagrees with the commenter's opinion that addition of the word "substantially" in proposed section 15065(a)(1) is vague; that it fails to acknowledge any impacts on endangered, rare or threatened species could jeopardize species survival and recovery; that it fails to provide the certainty intended by Public Resources Code section 21083, subdivision (b)(1); and that the change will lead to uncertainty and render section 15065 meaningless. See Agency's responses to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003, and Jan Chatten-Brown on behalf of the Natural Resources Defense Council dated October 27, 2003; and Agency's responses to comments regarding proposed section 15065(a) by Emily B. Roberson on behalf of the California Native Plant Society dated October 24, 2003.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003.

Summary: Commenters object to the addition of the word "substantially" in proposed section 15065(a)(1). Commenters contend "[a]ny reduction in the number or range of rare, threatened or endangered species may be significant." Commenters also contend that limiting "the reduction of these kinds of species to instances in which the reduction is 'substantial' violates CEQA, the state and federal endangered species acts, and the Native Plant Protection Act."

Response: Agency believes the commenter's remarks warrant no change to proposed section 15065(a)(1). See Agency's response to October 27, 2003 comments of Alison Anderson on section 15065.

Agency also disagrees that adding the word "substantially" to the "reduce the number or restrict the range" language in the mandatory findings violates CEQA, the State and federal Endangered Species Acts, or the Native Plant Protection Act. As for CEQA, nothing in the act requires the mandatory findings of significance to specifically require preparation of an EIR under the circumstances advocated by the commenters. Commenters themselves identify no such authority. In contrast, and as explained in more detail in response to the comments by Alison Anderson just mentioned, proposed section 15065(a) specifically implements and is consistent with section 21083, subdivisions (a) and (b), of the Public Resources Code. Thus, to the extent CEQA addresses the issue, the proposed action is consistent with controlling statutory authority. See Agency's response to comments regarding proposed section 15065(a) by Emily B. Roberson of the California Native Plant Society dated October 24, 2003. The response provides more detail regarding the alleged violation of CEQA associated with addition of "substantially" to the "reduce the number or restrict the range" language in the mandatory findings of significance.

Finally, Agency does not believe addition of the word "substantially" in proposed section 15065(a)(1) violates the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), the federal Endangered Species Act (16 U.S.C. § 1531 et seq.), or the California Native Plant Protection Act (NPPA) (Fish & G. Code, § 1900 et seq.). Commenters offer no explanation to support their contention. Their comments suggest a misunderstanding, however, of the different legal standards codified in CEQA versus these other important statutes.

In general, CESA, the NPPA and ESA prohibit "take" of certain special status species, except in authorized cases. (See, e.g., Fish & G. Code, §§ 1908, 1913, 2080, 2080.1, 2081, 2081.1; 16 U.S.C. §§ 1538, 1539.) CEQA, in contrast, requires assessment, meaningful consideration and disclosure, and adoption of feasible mitigation measures to address significant effects on the environment. Commenters apparently believe proposed section 15065(a)(1) is illegal because it will allegedly result in unauthorized "take" of species protected by CESA, the NPPA and ESA. Agency fails to see the connection. Whether a proposed project has the potential to result in a significant effect on an endangered, rare or threatened species under CEQA is a different legal issue from whether a proposed project will result in "take" of species protected by CESA, the NPPA or ESA, authorized or not.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters are "concerned about the use of the word . . . 'substantially'" in proposed section 15065(a)(1). Commenters assert use of the word is "unwarranted" and that it "violates expressed legislative policies" in CEQA, the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), and the Native Plant Protection Act (NPPA) (Fish & G. Code, § 1900 et seq.).

Response: Agency believes no change to proposed section 15065(a)(1) is warranted by commenters' remarks. First, Agency emphasizes addition of the word "substantially" in proposed section 15065(a)(1) is necessary and appropriate. See Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003.

Second, Agency does not believe addition of the word "substantially" in proposed section 15065(a)(1) runs counter to the various codified policy statements identified by the commenter. (See generally Pub. Resources Code, § 21001, subd. (c), Fish & G. Code, §§ 1900, 1901.) In general, the policy statements highlighted by the commenters underscore the need to preserve fish and wildlife species for future generations, particularly endangered, rare or threatened species. Yet, each of the statutes that include these policy statements contemplate or, in the case of CESA and the NPPA, specifically authorize "take" of certain special status species. (See, e.g., Fish & G. Code, §§ 1906, 1913,

2080.1, 2081, 2081.1.) In this sense, CEQA, CESA and the NPPA reflect the notion that potentially significant impacts on endangered, rare or threatened species, or the "take" of such species, are not necessarily inconsistent with the policy goals highlighted by the commenters. Indeed, Agency rejects the suggestion that a project with the mere potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species will necessarily foreclose the ability to "prevent the elimination" of such species, especially where the potential is avoided or reduced to below a level of significance through feasible project modifications or mitigation measures. Agency disagrees as a result that addition of the word "substantially" in proposed section 15065(a)(1) "violates expressed legislative policies" in CEQA, CESA and the NPPA.

Name/Date: Planning and Conservation League Foundation, Mary Akens, September 30, 2003.

Summary: Commenter contends addition of the word "substantially" in proposed section 15065(a)(1) is "inconsistent with the fair argument standard." Commenter also states it is "unclear" why this amendment to the mandatory findings is being made.

Response: Agency believes no change to proposed section 15065(a)(1) is warranted by the commenter's remarks. As regards the commenter's statement questioning the proposed action, see Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003.

Agency does not agree addition of the word "substantially" in proposed section 15065(a)(1) is inconsistent with the "fair argument" standard. Commenter's contention reflects the opinion that any potential impacts on endangered, rare or threatened species are significant and that preparation of an EIR is required in all such circumstances. Agency respects the commenter's opinion, but the issue at hand is whether the mandatory findings of significance should compel preparation of an EIR whenever there is the potential for such impacts. Public Resources Code section 21083 does not contemplate such a requirement, and the addition of the word "substantially" is consistent with statutory direction set forth in section 21083, subdivisions (a) and (b). For additional detail, please see Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003.

Name/Date: San Joaquin Raptor Rescue Center, Lydia Miller, and Protect Our Water, Steve Burke, October 27, 2003.

Summary: Commenters contend Agency should delete addition of the word "substantial" in proposed section 15065(a)(1). Commenters provide no explanation as to the basis for their recommendation.

Response: Agency believes no change to proposed section 15065(a)(1) is warranted by the commenters' remarks. See Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003.

Section 15065(a)(2)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter states Agency should delete subdivision (a)(2) in section 15065 "in deference to removal of similar language" in 1994, to former Public Resources Code section 21100. (See Stats. 1994, ch. 1230, § 9 (SB 749, Thompson).)

Response: This comment is not specifically directed at Agency's proposed amendment of section 15065 or the procedures followed by the Agency in proposing the amendment. (See Gov. Code, § 11346.9, subd. (a)(3).) Agency also notes that, under existing law, the "CEQA Guidelines" (CEQA Guidelines § 15000, et seq.) must include "criteria" requiring a "finding that a project may have a 'significant effect on the environment' if . . . . [¶] A proposed project has the potential . . . to achieve short-term, to the disadvantage of long-term, environmental goals." (Pub. Resources Code, § 21083, subd. (b)(2).) Thus, existing statutory authority compels the CEQA Guidelines to include the language objected to by the commenter.

Section 15065(a)(3)

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter contends the word "considerable" should not be changed to "significant" in proposed section 15065(a)(3). Commenter cites section 21083(b)(2) of the Public Resources Code and states "there is no authority for the change and it may be misconstrued."

Response: Agency does not believe the commenter's statements warrant a change to proposed section 15065(a)(3). Agency disagrees there is "no authority" to change the word "considerable" to "significant" in the proposed amendment. As noted above in the introduction, Public Resources Code section 21083 provides authority and directs Agency to certify and adopt provisions of the CEQA Guidelines necessary for the orderly evaluation of projects and their potential environmental impacts under CEQA.

Proposed section 15065(a)(3) is also consistent with and not in conflict with existing law. Section 21083 of the Public Resources Code requires the CEQA Guidelines to compel a finding that a proposed project "may have a 'significant effect on the environment'" where the "possible effects of a project are

individually limited but cumulatively considerable." (Pub. Resources Code, § 21083, subd. (b)(2).) See response to comments from Bay Area Council, October 24, 2003; Bay Area Council, public testimony by Andrew Michael, September 30, 2003 on section 15604(h) for an explanation of why interpreting "considerable" to mean "significant" appropriately interprets section 21083 of the Public Resources Code and effectuates the Legislature's intent.

Likewise, proposed section 15065(a)(3) is consistent with legislative intent expressed in Public Resources Code section 21083 to the effect that the mandatory findings of significance are intended to apply to impacts that are generally expected to be significant. Agency disagrees, as a result, that there is "no authority" for the changes to the CEQA Guidelines in proposed section 15065(a)(3).

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter recommends the following change to proposed section 15065(a)(3):

> (a)(3) The project has possible environmental effects that are individually limited but cumulatively ~~considerable. "Cumulatively considerable" means that the incremental effects on an individual project are~~ significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects as defined in Section 15130.

According to the commenter, the recommend change will "clarify when an EIR is required and the applicability of the fair argument standard to such determination."

Response: Agency believes no change to proposed section 15065(a)(3) is warranted by the commenter's remarks. Commenter's recommendation is not specific to the proposed action. Instead, the commenter believes the CEQA Guidelines would benefit from additional changes beyond those currently proposed. Agency may consider these comments in connection with future rulemaking.

Section 15065(b)

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter contends that, while it is important to "'dispel the misconception that the potential to trigger the mandatory finding requires an EIR' if mitigation removes that potential[,]" proposed section 15065(b) "seems to go too far." The proposed action goes too far in the commenter's opinion because

language in proposed section 15065(b)(1) addressing the addition of mitigation measures "prior to commencement of preliminary review of an environmental document" is "confusing." Commenter contends existing section 15065 "will suffice" and recommends proposed section 15065(b) "be eliminated altogether."

Response: Agency does not believe the comment warrants a change to proposed section 15065(b). Existing section 15065 will not "suffice," as the commenter notes, because it is important to clarify that the mandatory findings do not compel preparation of an EIR where the potential for related impacts can be avoided or mitigated to below a level of significance through project changes or mitigation measures imposed during preliminary review of proposed projects. In Agency's opinion, proposed section 15065(b) provides such clarification.

Likewise, Agency does not agree with the commenter's assertion that the language from proposed section 15065(b)(1) quoted in the comment summary above is "confusing." According to the commenter, the language is confusing because, "[w]hen 'preliminary' environmental review has not even begun, it would seem the lead agency is not yet involved in the project and no mitigations could yet have been suggested." In the commenter's view, the language is also confusing because, "[i]f an applicant proposes sufficient mitigations at the outset of a project, even before 'preliminary' review by the lead agency, those mitigations are simply part of the project description, and then there will be no potential impact to trigger a mandatory finding."

In Agency's view, the prospect that project changes or mitigation measures to avoid the potential for impacts triggering the mandatory findings might not be identifiable during preliminary review of a project (as opposed to "preliminary review of an environmental document"), or that such changes or measures might be incorporated into the project description early in the CEQA process does not render proposed section 15065(b) confusing. The proposed language is clear in the sense that project changes or mitigation measures to avoid the potential for impacts triggering the mandatory findings must be identified early in the CEQA process. This broad language is appropriate, in Agency's view, to encourage interaction and dialogue between project proponents and public agencies early in the CEQA process. Agency believes such encouragement is important. Such an approach is also consistent with the policy goal articulated in CEQA Guidelines section 15006, subdivision (h).

Name/Date: California Native Plant Society, Emily B. Roberson, October 24, 2003.

Summary: Commenter "strongly oppose[s]" proposed sections 15065(b)(1) and (2). According to the commenter, both proposed subsections would "remove" the existing burden faced by public agencies under CEQA to demonstrate "that a potential impact is not significant" and would instead "require the public to produce substantial evidence to demonstrate that an impact may be significant

and require preparation of an EIR." In addition, the commenter contends, public agencies could make the determinations contemplated by proposed section 15065(b) without the benefit of public review. From the commenter's view point, this approach is "very problematic" and it would be "more prudent to occasionally prepare an unnecessary EIR than to allow significant impacts to occur without analysis and without mitigation through failure to make findings of significance."

Response: Agency believes no change to proposed section 15065(b) is warranted by the commenter's remarks. Agency disagrees, in particular, that proposed section 15065(b) shifts any burden under CEQA from public agencies to the public generally. In general, proposed section 15065(b) clarifies that an EIR may not be necessary in all circumstances where a project has the potential to "substantially reduce the number or restrict the range" of an endangered, rare or threatened species if the potential for such impacts is avoided or where mitigation measures or project modifications mitigate any such potentially significant impacts to a point where clearly no significant effect on the environment would occur. This approach is entirely consistent with existing law governing preparation of mitigated negative declarations and no shifting of legal burdens or obligations would result as a consequence. (See generally Pub. Resources Code, §§ 21064.5, 21080, subd. (c)(2).) Indeed, existing law emphasizes public agencies face the burden of providing the judiciary with a reviewable record showing the factual basis for the agency's determination that a negative declaration, mitigated or otherwise, is appropriate. (See, e.g., *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 305; *Citizens Assoc. for Sensible Development v. County of* Inyo (1985) 172 Cal.App.3d 151, 171; CEQA Guidelines, § 15063, subds. (d)(3), (f).) Nothing in proposed section 15065(b) would change this controlling standard. Moreover, as noted above, proposed section 15065(b) merely provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b), however, a lead agency must still decide whether the proposed project, even as revised, may have a significant impact on the environment.

Agency also disagrees with the suggestion that public agencies could make the determinations contemplated by proposed section 15065(b) without the benefit of public input and review. Existing law requires public review of proposed negative declarations, mitigated or otherwise. (See generally Pub. Resources Code, §§ 21091, subd. (b), 21092; CEQA Guidelines, §§ 15072, subd. (a), 15073.) Nothing in proposed section 15065(b) changes this existing legal obligation. It is incorrect to say, as the commenter does, that the proposed action would permit public agencies to make the determinations contemplated by proposed section 15065(b) without public input and review.

Name/Date: County Sanitation Districts of Los Angeles County, Felicia Ursitti, October 23, 2003.

Summary: Commenter contends reference to "preliminary review" in proposed section 15065(b) is "unclear." Commenter also contends the "relevant cutoff date for agreed upon mitigation measures and project modifications should be the commencement of the public review period."

Response: Agency believes no change to proposed section 15065(b) is warranted by the commenter's remarks. For a more detailed response, please see Agency's response to comments regarding proposed section 15065(b)(1) by Vince Bertoni on behalf of the American Planning Association, California Chapter, dated September 22, 2003.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003.

Summary: Commenters object to proposed section 15065(b) because it "essentially set[s] up a pre-CEQA review of impacts and mitigation without actually going through the CEQA analysis even if there is a significant effect on the environment." Commenters also object to reliance on NCCPs and HCPs. According to the commenters, "there is no guarantee that these plans actually reduce the project's impact to less than significant. In addition, the commenters contend, "many of these plans may not address the needs of all threatened and endangered species in a project area."

Response: Agency believes no change to proposed section 15065(b) is warranted by the commenters' remarks. The proposed section reflects the concept that, in some circumstances, the potential for a significant effect on endangered, rare or threatened species can be avoided or mitigated up front by project changes or feasible mitigation measures to a point where clearly no significant effect on the environment would occur. In this respect, proposed section 15065(b) is consistent with existing law governing preparation of mitigated negative declarations. (See, e.g., Pub. Resources Code, §§ 21064.5, 21080, subd. (c)(2).) In any event, as noted above, proposed section 15065(b) merely provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b), a lead agency must still decide whether the proposed project, even as revised, may have a significant impact on the environment. Agency does not believe, as a result, that the proposed section "sets up" a pre-CEQA review process that circumvents preparation of required analysis.

Agency also disagrees with the commenters' remarks regarding NCCPs and HCPs, and proposed section 15065(b). Approved NCCPs and HCPs are not "reasons to avoid future CEQA analysis" under the proposed action. Under proposed section 15065(b), however, implementation of and required adherence to mitigation measures set forth in these approved plans may provide a basis for a lead agency to conclude that impacts on endangered, rare or threatened

species are avoided or mitigated to below a level of significance and therefore the project does not trigger a mandatory finding of significance. However, the lead agency would still have the obligation to prepare an EIR in the first instance if there was a fair argument that the specific project at issue had the potential to have a significant impact.

Whether such approved plans actually reduce a project's impact to a less than significant level or whether the plans address the needs of all threatened and endangered species in a project area are fact-specific determinations that will turn on the unique circumstances of each individual project and the controlling standard of judicial review. Therefore, Agency disagrees they warrant a change to proposed section 15065(b).

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters are concerned about the use of the word "substantially" in proposed section 15065(b)(2). Commenters believe use of the word is "unwarranted" and that it "violates expressed legislative policies" in CEQA, the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), and the Native Plant Protection Act (NPPA) (Fish & G. Code, § 1900 et seq.). Commenters also assert proposed sections 15065(b)(1) and (b)(2) are "unacceptable" because: (1) both sections "presuppose[] an outcome without the necessary analysis"; (2) language similar to existing CEQA Guidelines section 15070, subdivision (b)(1), "is all that is required"; and (3) "the mere fact that an HCP or NCCP has been completed does not obviate the need to evaluate the project's affect on rare, threatened, and endangered species."

Response: Agency believes no change to proposed section 15065(b) is warranted by the commenters' remarks. Agency does not believe addition of the word "substantially" in proposed section 15065(b)(2) is "unwarranted" or that it runs counter to the codified policy statements identified by the commenters. (See generally Pub. Resources Code, § 21001, subd. (c), Fish & G. Code, §§ 1900, 1901.) For additional detail, please see Agency's response to the commenter's similar remarks regarding proposed section 15065(a)(1).

Agency disagrees that proposed sections 15065(b)(1) and (b)(2) are "unacceptable" for the reasons indicated by the commenters. Neither section presupposes an outcome without required analysis. In other words, there would not be a mandatory finding of significance in certain specifically described circumstances. Under proposed section 15065(b)(1), there is no mandatory finding of significance where a project proponent agrees up front to project changes or mitigation measures that avoid any significant effect on the environment or mitigate the potential for any such significant effects to a point where clearly no significant effect on the environment would occur. In such circumstances, however, the lead agency would still have to prepare an EIR in

the first instance if there was a fair argument that the specific project at issue had the potential to have a significant impact (for example, if there was a significant impact not included in section 15065(a)). Alternatively, the lead agency could decide that a mitigated negative declaration would be required under CEQA. (See generally Pub. Resources Code, § 21080, subd. (c).) Mitigated negative declarations are subject, of course, to public review requirements. (See, e.g., Pub. Resources Code, §§ 21091, subd. (b), 21092; CEQA Guidelines, §§ 15072, subd. (a), 15073.)

Under proposed section 15065(b)(2), there is no mandatory finding of significance where the project proponent meets certain requirements associated with an approved HCP or NCCP. Again, in such circumstances, the lead agency would still have to prepare an EIR in the first instance if there was a fair argument that the specific project at issue had the potential to have a significant impact. Again, the lead agency could decide that a mitigated negative declaration subject to public review would be required under CEQA.

In short, proposed section 15065(b) provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b), however, a lead agency must still decide – consistent with existing law – whether the proposed project, even as revised, may have a significant impact on the environment.

Agency also disagrees the purpose of proposed section 15065(b) can be accomplished with language similar to existing CEQA Guidelines section 15070, subdivision (b)(1). This provision of the CEQA Guidelines, which is substantially similar to a portion of section 21080, subdivision (c), of the Public Resources Code, reflects an important component of the standard governing preparation of mitigated negative declarations generally. Both section 21080(c)(2) of the Public Resources Code and CEQA Guidelines section 15070(b)(1) are substantially similar to proposed section 15065(b)(1). The proposed action, in this respect, effectuates the commenter's recommendation. Commenter's objection, as a result, appears directed at proposed section 15065(b)(2). Yet, the policy aim of proposed section 15065(b)(2) is not accomplished by the more generic language in CEQA Guidelines section 15070(b)(1) or proposed section 15065(b)(1). Specifically, Agency believes the CEQA Guidelines should include specific direction regarding application of the mandatory findings of significance against the backdrop of approved HCPs and NCCPs. Once again, this goal is not accomplished by the more limited language in CEQA Guidelines section 15070, subdivision (b)(1).

Finally, Agency agrees with the commenters that "the mere fact that an HCP or NCCP has been completed does not obviate the need to evaluate the project's effect on rare, threatened, and endangered species." Proposed section 15065(b)(2) excepts the project only from a mandatory finding of significance.

Consistent with existing law, should a lead agency exercise its discretion and reach the conclusion that the proposed project's mitigation measures or project modifications would avoid any significant effect on the environment, it must substantiate the basis for its determination against the backdrop of CEQA's "fair argument" standard and subject its documented analysis to public review. (See, e.g., Pub. Resources Code, §§ 21080, subd. (c), 21091, subd. (b), 21092; CEQA Guidelines, §§ 15072, subd. (a), 15073.) In this respect, Agency disagrees that proposed section 15065(b) "presupposes" an outcome or excuses public agencies from "required" analysis. Commenter is wrong to suggest, as a result, that mere consistency with an approved HCP or NCCP will completely insulate lead agencies from the "fair argument" standard and always render preparation of an EIR unnecessary where the potential for impacts on endangered, rare or threatened species exists**.**

Section 15065(b)(1)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003

Summary: Commenter recommends a revision to proposed section 15065(b)(1). Commenter states the revision "would allow for preparation of an initial study before agreeing on mitigation." In the commenter's view, "the timing of the mitigation is too early" under Agency's proposal.

Response: Agency does not believe the change proposed by the commenter is warranted. The proposed action speaks in terms of project proponents agreeing to mitigation measures or project modifications, as appropriate, "prior to the commencement of preliminary review of an environmental document" under CEQA. This language is intended to encourage interaction and dialogue between project proponents and public agencies early in the CEQA process. Commenter, in contrast, recommends language indicating such an agreement must occur "before the proposed negative declaration or mitigated negative declaration or draft environmental impact report is released for public review[.]" Agency believes encouraging project proponents to commit to mitigation measures early in the CEQA process is important and consistent with the policy goal articulated in CEQA Guidelines section 15006, subdivision (h).

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003

Summary: Commenter recommends Agency revise the proposed amendment of CEQA Guidelines section 15065(b)(1) to state: "Where, prior to ~~commencement of preliminary review~~ ***completion of the initial study*** of an environmental document, a project proponent agrees to mitigation measures . . . ."

Response: Agency does not believe the commenter's recommendation warrants a change to proposed section 15065(b)(1). The proposed action speaks in terms of project proponents agreeing to mitigation measures or project modifications, as appropriate, "prior to the commencement of preliminary review of an environmental document" under CEQA. This language is intended to encourage interaction and dialogue between project proponents and public agencies early in the CEQA process. Commenter, in contrast, recommends language indicating such an agreement must occur "prior to the completion" of an "initial study" under CEQA. Yet, a lead agency need not prepare an initial study in all circumstances. (CEQA Guidelines, § 15063, subd. (a).) Proposed section 15065(b)(1) is preferable as a result. Likewise, Agency believes it is important to encourage project proponents to commit to mitigation measures early in the CEQA process, including prior to completion of an initial study. Moreover, this approach is consistent with the policy goal articulated in CEQA Guidelines section 15006, subdivision (h).

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter contends use of the word "clearly" in proposed section 15065(b)(1) "appears to establish a new evidentiary standard for findings related to the mandatory findings of significance." Commenter recommends the following revision to the proposed section as a result: "Where, prior to the commencement of preliminary review of an environmental document, a project proponent agrees to mitigation measures or project modifications that would avoid any *potentially* significant effect on the environment specified by subdivision (a) or would mitigate the *potential* ~~significant~~ effect ~~to a point where clearly no significant effect on the environment would occur~~ *below a level of significance* . . . ." According to the commenter, the recommended change is "preferable to maintain consistency throughout the statutory provisions."

Response: Agency does not believe the change recommended by the commenter to proposed section 15065(b)(1) is warranted. Use of the word "clearly" is consistent with applicable statutory authority governing preparation of mitigated negative declarations under CEQA. (See Pub. Resources Code, §§ 21064.5, 21080, subd. (c)(2)(A).) Both of these statutory provisions provide, in pertinent part, that mitigated negative declarations are appropriate under CEQA where, among other things, an initial study identifies potentially significant effects on the environment, but revisions in the project plans or proposals made by, or agreed to by, the applicant "avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur[.]" Agency does not believe, as a result, that the commenter's recommended change is necessary to "maintain consistency" with statutory authority.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera;

Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters support proposed section 15065(b)(1).

Response: Agency notes this support of the proposed amendment.

Name/Date: Environmental Defense Center, Linda Krop, October 6, 2003.

Summary: Commenter is concerned that proposed section 15065(b)(1) "provides a back-door process whereby an applicant can avoid the public debate intended by CEQA." According to the commenter, where a proposed project has the potential to result in the types of environmental impacts addressed by proposed section 15065(a), "there should be a full public debate on the various mitigation measures and alternatives that are capable of reducing or avoiding such impacts."

Response: Agency believes no change to proposed section 15065(b)(1) is warranted by the commenter's remarks. Proposed section 15065(b)(1) will not thwart public review and "debate" required by CEQA. Under the proposed section, an EIR may not be required where a project proponent agrees up front to project changes or mitigation measures that avoid any significant effect on the environment or mitigate the potential for any such significant effects to a point where clearly no significant effect on the environment would occur. In such circumstances, however, a mitigated negative declaration would be required under CEQA. (See generally Pub. Resources Code, § 21080, subd. (c).) Mitigated negative declarations are subject, of course, to public review requirements. (See, e.g., Pub. Resources Code, §§ 21091, subd. (b), 21092; CEQA Guidelines, §§ 15072, subd. (a), 15073.) Moreover, because proposed section 15065(b) merely provides an exception to the mandatory findings of significance in certain limited circumstances, a lead agency must still decide – consistent with existing law – whether the proposed project, even as revised, may have a significant impact on the environment. Agency disagrees, as a result, that proposed section 15065(b)(1) provides a mechanism to avoid public debate intended by CEQA. Agency disagrees for the same reason that the proposed section forecloses meaningful consideration of potentially feasible project changes, mitigation measures or alternatives that may avoid or mitigate project related significant effects on the environment.

Name/Date: Planning and Conservation League Foundation, Mary Akens, September 30, 2003.

Summary: Commenter contends proposed section 15065(b)(1) is "confusing" and "[e]xamples must be provided to inform the reader what kind of project modifications must be considered for both short-term and long-term project impacts."

Response: Agency believes no change to proposed section 15065(b)(1) is warranted by the commenter's remarks. Agency disagrees that proposed section 15065(b)(1) is confusing and that examples of project modification should be provided to inform the reader. Proposed section 15065(b)(1) is modeled on similar language in sections 21064.5 and 21080, subdivision (c)(2) of the Public Resources Code. Agency believes this is important for clarity and consistent application. Likewise, with respect to examples of project modifications, Agency believes this issue is better left to project specific circumstances and the exercise of discretion by individual agencies.

Name/Date: San Joaquin Raptor Rescue Center, Lydia Miller, and Protect Our Water, Steve Burke, October 27, 2003.

Summary: Commenters contend Agency should delete proposed section 15065(b)(1). According to the commenters, proposed section 15065(b)(1) is a "patently unworkable, tautological, exclusion from the preparation of an EIR." Commenters also question "[h]ow it is possible to determine the need for the mitigation measures mentioned [in the proposed section], or their success, without going through the very process that would be obviated by both these factors?"

Response: Agency believes no change to proposed section 15065(b)(1) is warranted by the commenters' remarks. Agency disagrees with the commenters' characterization of proposed section 15065(b)(1). Proposed section 15065(b)(1) is workable and consistent with existing law governing the preparation of mitigated negative declarations. For additional detail responding to the present comment, please see Agency's responses to comments regarding proposed section 15065(b) by Emily B. Roberson of the California Native Plant Society dated October 24, 2003; and Kim Delfino of Defenders of Wildlife, and Bill Allayaud of the Sierra Club dated October 27, 2003; and Agency's responses to comments regarding proposed section 15065(b)(1) by Vince Bertoni of the California Chapter of the American Planning Association dated September 22, 2003; Dwight Steinert of the Association of Environmental Professionals dated October 1, 2003; Jennifer T. Buckman of Best, Best & Krieger LLP dated October 27, 2003; and Linda Krop of the Environmental Defense Center dated October 6, 2003.

Name/Date: Sempra Energy, October 27, 2003.

Summary: Commenter recommends deleting the word "clearly" in proposed section 15065(b)(1). According to the commenter, use of the term will "invite disputes" between lead agencies and project proponents.

Response: Agency believes no change to proposed section 15065(b)(1) is warranted by the commenter's remarks. Use of the word "clearly" is consistent with similar relevant language in Public Resources Code sections 21064.5 and

21080, subdivision (c)(2). Consistency with statutory language is important and Agency believes no change to proposed section 15065(b)(1) should be made as a result.

Section 15065(b)(2)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter recommends a change to proposed section 15065(b)(2)(A). Commenter suggests revising the proposed section to state that a lead agency need not prepare an EIR for a project with the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species solely because of such effect where, among other things, "the project is subject to an incremental [sic] take permit issued pursuant to the California Endangered Species Act[.]" Commenter believes this revision would allow projects receiving "take" authorization from the Department of Fish and Game under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.) to "avoid a mandatory finding" under section 15065 because such authorization from the Department must "'fully avoid' impacts[.]"

Response: Agency does not believe the change proposed by the commenter is warranted. Commenter's suggested revision would extend proposed section 15065(b)(2)(A) to circumstances where the Department of Fish and Game issues an incidental take permit under CESA pursuant to Fish and Game Code section 2081. At present, Agency believes proposed sections 15065(b)(2)(A) and (B) are limited appropriately to approved HCPs and NCCPs. Agency intended the proposed amendments to section 15065 to encourage the development of regional mitigation planning. Therefore, the commenter's suggestions are beyond the scope of this rulemaking and are declined.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter recommends Agency change proposed section 15065(b)(2)(C)(2) to state: "2. such requirements preserve, restore, or enhance sufficient habitat to mitigate the ~~reduction in habitat~~ ***impacts to habitat*** or number of the affected species to below a level of significance."

Response: Agency does not believe the change recommended by the commenter is warranted. Proposed section 15065(b)(2)(C)(2) refers to habitat-based mitigation to address project related reduction in individual number or loss of habitat for endangered, rare or threatened species. The section also underscores that mitigation must reduce such impacts to below a level of significance. In this regard, and as compared to the change recommended by

the commenter, the proposed amendment to section 15065(b)(2)(C)(2) tracks more closely existing language in section 15065(a).

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter does not support proposed section 15065(b)(2)(C). According to the commenter, the proposed section sets a standard of "no net habitat loss." In the commenter's view, "[t]his standard is beyond that required under the federal or state endangered species laws and [it] is likely unobtainable in nearly all cases."

Response: Agency does not believe the commenter's statements warrant a change to proposed section 15065(b)(2)(C). Commenter is incorrect that proposed section 15065(b)(2)(C) sets a "standard" of "no net habitat loss." In general, proposed section 15065(b) addresses circumstances where there is no mandatory finding of significance because the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species is avoided or mitigated to a point where clearly no significant effect on the environment would occur. In contrast to the commenter's suggestion, proposed section 15065(b)(2) builds on proposed section 15065(b)(1) and states that a lead agency need not prepare an EIR solely because of the prospect to substantially reduce the number or restrict the range of an endangered, rare or threatened species where: (1) the project proponent is bound to implement related mitigation pursuant to an approved HCP or NCCP; (2) a state or federal agency approved the HCP or NCCP in reliance on an EIR or an environmental impact statement (EIS) prepared pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.); and (3) such requirements avoid any net loss of habitat and net reduction in number of affected species; or (4) such requirements preserve, restore, or enhance sufficient habitat to mitigate the reduction in habitat and number of the affected species to below a level of significance. As noted above, proposed section 15065(b)(2) provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b)(2), however, a lead agency must still decide – consistent with existing law – whether there is a fair argument that the specific project at issue has the potential to have a significant impact on the environment. See response to Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter does not support proposed section 15065(b)(2). According to the commenter, the proposed amendment is "ill advised" and "bad policy, as it provides a *dis*incentive to participate in regional habitat conservation planning efforts." (Italics in original.) According to the commenter, the proposed amendment also runs counter to the notion that EIRs are prepared because

impacts subject to the "reduce the number or restrict the range" language in the existing mandatory findings "cannot be mitigated to below a level of significance." Commenter recommends "deleting or substantially rewriting" proposed section 15065(b)(2). Commenter, however, offers no specific changes to the proposed section.

Response: Agency does not believe the commenter's statements warrant a change to proposed section 15065(b)(2). Agency believes no change is warranted, in part, because it disagrees with a number of statements offered by the commenter. Commenter states, for example, that "EIRs are prepared for [habitat conservation plans or "HCPs"] because the implementation of the HCP will have some potentially significant effects that cannot be mitigated to below a level of significance." Commenter appears to confuse the state and federal take authorization scheme. An HCP refers to the conservation plan that must be prepared by an individual seeking an incidental take permit under section 1539(a)(2)(A) of the federal Endangered Species Act. An Environmental Impact Statement (EIS) is generally prepared by the federal resource agency that is issuing the incidental take permit. An EIR would not have to be prepared unless a state agency were required to approve some aspect of the HCP.

Similarly, it is not accurate to say EIRs are prepared because impacts subject to the "reduce the number or restrict the range" language in the existing mandatory findings "cannot be mitigated to below a level of significance." An EIR must be prepared under CEQA whenever substantial evidence supports a fair argument that a proposed project may result in a significant effect on the environment. (See, e.g., Pub. Resources Code, § 21080, subd. (d).) Such evidence exists, as illustrated by comments from the California Supreme Court, whenever substantial evidence supports a fair argument that a project, even as mitigated, has the "potential for population reduction or habitat restriction" of an endangered, rare or threatened species. (*Mountain Lion Foundation v. Fish and Game Comm.* (1997) 16 Cal.4th 105, 124; see also *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 400-402.) Section 15065(b)(2) provides only that there is no mandatory finding of significance where a project proponent meets certain requirements associated with an approved HCP or NCCP. Case law indicates lead agencies may exercise their discretion under CEQA and conclude in appropriate circumstances that impacts to endangered, rare or threatened species or their habitat are mitigated to below a level of significance under CEQA. (See *National Parks Conservation Assoc. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1365-1367.)

Agency does not believe proposed section 15065(b)(2) creates a disincentive for state and local agencies "to participate in regional habitat conservation planning efforts." In fact, Agency believes the proposed amendments to section 15065 will encourage the development of Natural Community Conservation Plans (NCCPs) under state law and HCPs under federal law. (See generally Fish & G. Code, § 2800 et seq.; 16 U.S.C. § 1539(a)(2)(A).) Such encouragement will occur

through proposed section 15065(a) as explained in Agency's response to comments regarding section 15065 by Alison Anderson dated October 27, 2003. Such encouragement will also occur as a result of proposed section 15065(b), which details circumstances under which there is no mandatory finding of significance. Proposed section 15065 should streamline environmental review associated with implementation of approved NCCPs and HCPs where these approvals are based on thorough environmental review in an EIR or EIS, as well as findings by the lead agency that impacts on endangered, rare or threatened species and their habitat are mitigated to below a level of significance.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenter recommends the following change to proposed section 15065(b)(2):

> Furthermore, where a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species, the lead agency need not prepare an EIR solely because of such effect, if:
> ~~(A)~~ the project proponent is bound to implement mitigation requirements relating to such species ~~and habitat~~ pursuant to ~~an approved habitat conservation plan or natural community conservation plan;~~ *requirements imposed and administered under the federal or state endangered species acts and CEQA or NEPA.*
> ~~(B) the state or federal agency approved the habitat conservation plan or natural community conservation plan in reliance on an environmental impact report or environmental impact statement; and~~
> ~~(C)1. such requirements avoid any net loss of habitat and net reduction in number of the affected species; or~~
> ~~2. such requirements preserve, restore, or enhance sufficient habitat to mitigate the reduction in habitat and number of the affected species to below a level of significance.~~

Commenter contends the change is necessary because proposed section 15065(b)(2) is "too limited" and it "cut[s] back on" the discretion public agencies currently enjoy with respect to determinations regarding mitigation measures for impacts on endangered, rare or threatened species. Commenter also states that proposed section 15065(b)(2) "preclude[s] a mitigation finding based on other mitigation programs that are equally if not more effective" than habitat

conservation plans (HCPs) and natural community conservation plans (NCCPs) prepared and approved under State and federal law.

Response: Agency does not believe the commenter's recommended change is warranted. In general, proposed section 15065(b) explains that a proposed project with the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species does not trigger the mandatory findings of significance where mitigation measures or project modifications agreed to by the applicant would avoid or mitigate such impacts to a point where clearly no significant effect on the environment would occur. Proposed section 15065(b)(2) builds on this general statement to address specific circumstances involving HCPs or NCCPs approved after thorough environmental review under CEQA or the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq). In contrast to the commenter's remarks, nothing in proposed section 15065(b)(2) would "preclude" public agencies in California from making the determination set forth in proposed section 15065(b)(1) based on "mitigation programs that are equally if not more effective" than HCPs and NCCPs. For the same reason, proposed section 15065(b)(2) does not "eliminate flexibility that local agencies may have in providing mitigation measures that are appropriate to local conditions."

Name/Date: California Native Plant Society, Emily B. Roberson, October 24, 2003.

Summary: Commenter is "particularly concerned" with proposed section 15065(b)(2) and contends the proposal should be "withdrawn." Commenter asserts there is "no guarantee" approved HCPs and NCCPs mitigate impacts on endangered, rare or threatened species to below a level of significance under CEQA. The same is true, according to the commenter, of the "[p]roject proponent-proposed mitigation plans" contemplated by proposed section 15065(b)(1) because these "plans" need not "meet the scientific or legal standards" governing HCPs and NCCPs. Commenter contends, as a result, that an EIR "should be required" unless "any potentially significant impacts are "demonstrably *avoided*[.]" (Italics in original.)

Response: Agency believes no change to the proposed action is warranted by the commenter's remarks. Section 15065(b)(2) provides only that there is no mandatory finding of significance where the project proponent meets certain requirements associated with an approved HCP or NCCP. The lead agency would still have to prepare an EIR if there was a fair argument that the specific project at issue had the potential to have a significant impact.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003.

Summary: Commenters object to addition of the word "substantially" in proposed section 15065(b)(2). Commenters contend "[a]ny reduction in the number or range of rare, threatened or endangered species may be significant." Commenters also contend that limiting "the reduction of these kinds of species to instances in which the reduction is 'substantial' violates CEQA, the state and federal endangered species acts, and the Native Plant Protection Act."

Response: Agency believes the commenter's remarks warrant no change to proposed section 15065(b)(2). Please see Agency's response to the commenters' similar remarks regarding proposed section 15065(a)(1) for a more detailed explanation.

Name/Date: Environmental Defense Center, Linda Krop, October 6, 2003.

Summary: Commenter recommends a change to proposed section 15065(b)(2)(C). According to the commenter, compliance with proposed sections 15065(b)(2)(C)(1) and 15065(b)(2)(C)(2) should both be required for proposed section 15065(b)(2) to apply. Commenter contends the change is necessary because significant effects on the environment may occur even with "take" authorization under the State or federal Endangered Species Acts.

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. Commenter's remarks, just like those of the California Native Plant Society, reflect the misperception that proposed section 15065(b)(2) applies whenever a proposed project implements or adheres to mitigation requirements for endangered, rare or threatened species in an approved HCP or NCCP. It does not. Proposed section 15065(b)(2) provides an exception to the mandatory findings of significance in certain limited circumstances. See response to Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003; response to comments regarding proposed section 15065(b)(2) by Emily B. Roberson of the California Native Plant Society dated October 24, 2003.

Name/Date: County of Santa Barbara, Richard A. Kentro, October 27, 2003.

Summary: Commenter "appreciates the flexibility" afforded by proposed section 15065(b)(2), but "would like the Guidelines to more clearly state" that a lead agency "still has the prerogative to require an EIR when a residual impact would occur." According to the commenter, proposed language that the "lead agency *need not* prepare an EIR" is "vague." (Italics in original.)

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. In general, proposed sections 15065(b)(1) and (b)(2) both state that a lead agency "need not" prepare an EIR "solely" because of the potential for a significant effect on the environment if that effect can be avoided or mitigated to below a level of significance. Use of the

words “solely” and “need not” underscores that proposed section 15065(b)(2) merely provides an exception to the mandatory findings of significance in certain limited circumstances. See Agency’s response to Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Accordingly, Agency disagrees that use of the words “need not” prepare an EIR is vague or that the issue requires clarification in proposed section 15065(b).

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter recommends deleting proposed section 15065(b)(2)(b), which provides: “(B) the state or federal agency approved the habitat conservation plan or natural community conservation plan in reliance on an environmental impact report or environmental impact statement; and[.]” According to the commenter, “there is no reason” for proposed section 15065(b)(2)(B) “in light of section 15065(b)(2)(A).” Likewise, the commenter suggests there is no need to tie an NCCP or HCP to preparation of an EIR or EIS because a “mitigated negative declaration and or an environmental assessment may be sufficient in certain instances.”

Response: Agency believes no change to proposed section 15065(b)(2)(B) is warranted by the commenter’s remarks. Agency believes proposed section 15065(b)(2)(B) is necessary, even with proposed section 15065(b)(2)(A), because of the more detailed, comprehensive environmental review that occurs with preparation of an EIR or EIS as compared to a mitigated negative declaration or environmental assessment. That is to say, Agency believes the potential benefit of not triggering a mandatory finding of significance afforded by proposed section 15065(b)(2) should be appropriately contingent upon preparation of an EIR or EIS.

Name/Date: Planning and Conservation League Foundation, Mary Akens, September 30, 2003.

Summary: Commenter contends addition of the word “substantially” in proposed section 15065(b)(2) “contradict[s] the fair argument standard.” Commenter also contends the proposed section should be revised to clarify a lead agency proposing to rely on an approved HCP or NCCP may only do so for project impacts that are the same impacts “previously evaluated so that the agency can literally tier from the prior EIR[.]”

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter’s remarks. The Resource Agency does not believe addition of the word “substantially” in the proposed section contradicts the “fair argument” standard. For additional detail, please see Agency’s response to the commenter’s similar remarks regarding proposed section 15065(a)(1).

Agency also does not believe the change to proposed section 15065(b)(2) recommended by the commenter is appropriate. The proposed section clarifies a lead agency is not compelled to require an EIR in those narrowly described circumstances that constitute an exception to a mandatory finding of significance. See Agency's response to Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003**.**

Name/Date: San Joaquin Raptor Rescue Center, Lydia Miller; Protect Our Water, Steve Burke, October 27, 2003.

Summary: Commenters contend Agency should delete proposed section 15065(b)(2). According to the commenters, "[r]eliance on an existing Habitat Conservation Plan or Natural Community Conservation Plan to mitigate for impacts to listed species is not adequate to insure the protection of these resources."

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenters' remarks. See Agency's response to comments regarding proposed section 15065(b) by Kim Delfino for the Defenders of Wildlife and the Sierra Club dated October 27, 2003; and comments regarding proposed section 15065(b)(2) by Emily B. Roberson of the California Native Plant Society dated October 24, 2003.

Name/Date: Sempra Energy, October 27, 2003.

Summary: Commenter recommends changing the word "need" in proposed section 15065(b)(2) to "shall." Commenter contends the recommended change is necessary to "remove[] any ambiguity in this requirement for lead agencies." Commenter also recommends changing proposed sections 15065(b)(2)(A) and (B) to state, in pertinent part, that ". . . approved habitat conservation plan**,** ~~or~~ natural community conservation plan*, or similar environmental review document* . . . ." According to the commenter, the recommended change is necessary because "mitigated negative declaration (MND) documents are as comprehensive as an EIR or EIS."

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. Agency disagrees with the commenter's first recommended change. As noted, section 15065(b)(2) provides an exception to the mandatory findings of significance in certain limited circumstances. The lead agency would still have to prepare an EIR if there was a fair argument that the specific project at issue had the potential to have a significant impact. Lead agencies have discretion to determine whether substantial evidence supports a fair argument that a proposed project may have a significant effect and that preparation of an EIR is required. See generally *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 (hereinafter *Communities for a Better Environment*).

Likewise, Agency believes proposed sections 15065(b)(2)(A) and (B) are limited appropriately to approved HCPs and NCCPs. These sections deal specifically with mitigation requirements set forth in approved HCPs and NCCPs as a basis to prepare a mitigated negative declaration where clearly no significant effect on the environment would occur and there is no substantial evidence supporting a fair argument that significant effects on the environment may result. In Agency's opinion, limiting these sections to approved HCPs and NCCPs is appropriate given that these documents are prepared and approved through a well-defined, detailed and careful process, with which lead agencies in California have gained experience over the years. Agency has no similar basis of confidence in unspecified "similar environmental review document[s]." Agency notes, however, that an applicant's commitment to adhere to or implement mitigation requirements set forth in a "similar environmental review document" may provide a basis for a lead agency to determine that an EIR is not required pursuant to proposed section 15065(b)(1).

Name/Date: Shute, Mihaly & Weinberger LLP, Ellison Folk, October 27, 2003.

Summary: Commenter contends proposed section 15065(b)(2) is "wholly inconsistent" with section 21083 of the Public Resources Code and the holding of *Communities for a Better Environment,* pp. 110-114, regarding former CEQA Guidelines section 15064, subdivision (h). According to the commenter, this provision of CEQA "mandates a finding of significance where a project has the potential to substantially reduce the number or restrict the range of an endangered or threatened species." Moreover, commenter states that proposed section 15065(b)(2) "operates in the same manner as former Guideline section 15064(h)," which the court invalidated in *Communities for a Better Environment*. (*Id.*, 103 Cal.App.4th at pp. 110-114.) Commenter contends, "[j]ust as section 15064(h) relieved the lead agency of finding a significant impact if the environmental effect complied with an approved standard that the agency found appropriate, proposed section 15065(b)(2) exempts a lead agency with a 'proposed project [that] has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species' from preparing the required EIR if it is subject to an approved HCP or NCCP."

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. Agency does not agree that section 21083 of the Public Resources Code "mandates a finding of significance where a project has the potential to substantially reduce the number or restrict the range of an endangered or threatened species." See Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003, for a more detailed discussion of the proposed action and its consistency with the statutory mandate set forth in section 21083 of the Public Resources Code.

Agency also disagrees proposed section 15065(b)(2) runs counter to the holding in *Communities for a Better Environment*. Proposed section 15065(b)(2) does

not “exempt” lead agencies from preparing EIRs whenever a proposed project is subject to an approved HCP or NCCP. Nor does it “exempt” lead agencies from “considering ‘fair arguments’ that a HCP or NCCP may be insufficient to prevent a reduction in the number or range of endangered, rare or threatened species.” Rather, proposed section 15065(b)(2) provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b)(2), however, a lead agency must still decide – consistent with existing law – whether the proposed project, even as revised, may have a significant impact on the environment.

Section 15065(c)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter recommends a change to proposed section 15065(c). Commenter recommends the proposed section state, in pertinent part, that “[f]ollowing the decision to prepare an EIR pursuant to subsection (a), the mandatory finding of significance shall guide . . . .” In contrast, the section as proposed by Agency states that, “Following the decision to prepare an EIR, if a lead agency determines that any of the conditions specified by subsection (a) will occur, such a determination shall apply to . . . .”

Response: Agency does not believe the change proposed by the commenter is warranted. The language recommended by the commenter does not propose a substantive change to proposed section 15065(c). Instead, the recommendation appears to reflect the commenter’s preference in word choice. Agency appreciates the suggestion, but prefers the language set forth in proposed section 15065(c).

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter recommends without explanation that Agency delete proposed section 15065(c).

Response: Agency does not believe the change recommended by the commenter is warranted. Proposed section 15065(c) clarifies the mandatory findings control not only the decision of whether to prepare an EIR but also the identification of effects to be analyzed in depth in the EIR, the requirement to make detailed findings on the feasibility of alternatives or mitigation measures to reduce or avoid the significant effects, and when found to be feasible, the making of changes in the project to lessen the adverse environmental impacts. (See, e.g., *Communities for a Better Environment*, pp 120-121 (the mandatory findings “’control not only the decision of whether to prepare an EIR but also the

identification of effects to be analyzed in depth in the EIR'"); *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024, fn. 6 (referring to Discussion following section 15065, the court remarks, "[w]hile section 21083 governs the situations in which an agency must prepare an EIR, its provisions have also been applied to the contents of an EIR once its is determined an EIR must be prepared").)

Proposed section 15065(c) is necessary in this respect to insure that public agencies address concerns throughout the CEQA process identified by the Legislature associated with impacts that are significant by definition. Consistent with case law, Agency also emphasizes that, where the agency complies with the obligations that stem from the mandatory findings (i.e., prepares an EIR, identifies impacts at the outset as potentially significant, analyzes potentially feasible mitigation measures and alternatives, and complies with CEQA's "substantive mandate" to mitigate to the extent feasible), the agency is not precluded from exercising its discretion and concluding, based on substantial evidence, that such impacts are mitigated to below a level of significance. (See *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1365-1367.)

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter does not support proposed section 15065(c). According to the commenter, this section provides that, "once a mandatory finding of significance is made and triggers preparation of an EIR, that finding must carry through the entire CEQA process." Commenter contends such a requirement is "contrary to CEQA's fundamental premise that mitigation measures should be identified and recommended to the decision makers wherever possible." Commenter also states that proposed section 15065(c) "undermines applicants' ability to rely on NCCPs or HCPs, which in turn will reduce their desire to pursue such plans."

Response: Agency does not believe the commenter's statements warrant a change to the proposed action. Agency disagrees that proposed section 15065(c) stands for the proposition that, once the mandatory findings of significance are triggered, the findings control the "entire CEQA process." Assuming proposed section 15065(a) applies and proposed section 15065(b) does not, the mandatory findings control not only the decision of whether to prepare an EIR but also the identification of effects to be analyzed in depth in the EIR, the requirement to make detailed findings on the feasibility of alternatives or mitigation measures to reduce or avoid the significant effects, and when found to be feasible, the making of changes in the project to lessen the adverse environmental impacts. Thereafter, each lead agency must exercise its discretion and determine whether project-related environmental impacts subject to the mandatory findings are avoided or mitigated to below a level of significance or whether a statement of overriding considerations is required. In

Agency's view, proposed section 15065(c) is consistent with existing law. (See *Communities for a Better Environment,* pp. 120-121; *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024, fn. 6; *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1365-1367; see also Discussion following CEQA Guidelines, § 15065.) In this respect, proposed section 15065(c) neither controls the "entire CEQA process" nor is it contrary to CEQA's "substantive mandate," which requires public agencies to mitigate significant environmental impacts to the extent feasible. (See, e.g., Pub. Resources Code, §§ 21002, 21002.1, subds. (a) and (b).)

Agency also disagrees that proposed section 15065(c) will serve as a disincentive to the development of Natural Community Conservation Plans (NCCPs) under state law or the preparation of habitat conservation plans (HCPs) under federal law. See Agency's response to Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003 on this issue.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter contends proposed section 15065(c) should be "substantially rewritten" because it is "ambiguous and unclear." Commenter offers no explanation, however, as to why or how proposed section 15065(c) is ambiguous and unclear, and provides no specific recommended changes to the proposed section.

Response: Agency does not believe the commenter's statements warrant a change to proposed section 15065(c). Agency does not believe proposed section 15065(c) is ambiguous and unclear. Likewise, Agency does not believe proposed section 15065(c) should be rewritten to "clarify what is being required of local agencies." Proposed section 15065(c) is clear, unambiguous and specific as to what is required of lead agencies subject to CEQA.

For additional detail, please see Agency's response to comments regarding proposed section 15065(c) by Dwight Steinert of the Association of Environmental Professionals dated October 1, 2003, and the Bay Area Council dated October 27, 2003.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters recommend deleting proposed section 15065(c). According to the commenter, the proposed amendment "broaden[s] the reach" of existing section 15065 "well beyond its current application." From the commenters' view point, under existing law, " CEQA Guidelines section 15065

"only applies to initial studies prepared at the beginning of the CEQA process in connection with the decision whether to adopt a negative declaration or prepare an EIR."

Response: Agency does not believe the commenters' remarks warrant a change to proposed section 15065(c). Commenters' remarks appear to reflect a misunderstanding of existing law. (See generally *Communities for a Better Environment*, pp. 120-121; *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024, fn. 6; *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1365-1367; see also Discussion following CEQA Guidelines, § 15065.) In this respect, please see Agency's responses to comments regarding proposed section 15065(c) by Dwight Steinert of the Association of Environmental Professionals dated October 1, 2003, and the Bay Area Council dated October 27, 2003, for an explanation as to why proposed section 15065(c) is both appropriate and necessary.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Commenter contends proposed section 15065(c) is "unclear and should be rejected." The proposed section is unclear according to the commenter "because it raises questions, like are the guidelines limiting what the determination in subsection 'a' applies to, and if so, why is the determination being limited in this manner?"

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15065(c). As explained in the response to the comment regarding proposed section 15065(c) by Jennifer T. Buckman of Best, Best & Krieger LLP dated October 27, 2003, Agency does not believe this proposed section is unclear. Indeed, as explained in Agency's responses to comments regarding proposed section 15065(c) by the Association of Environmental Professionals, Dwight Steinert, dated October 1, 2003, and the Bay Area Council dated October 27, 2003, proposed section 15065(c) is both appropriate and necessary.

SECTION 15075. Notice of Determination on a Project for Which a Proposed Negative Declaration Has Been Approved.

Section 15075(a)

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter states that requiring an agency to post a Notice of Determination after each phase of discretionary decisions may create problems.

Response: Agency does not believe commenter's remarks warrant a change to section 15075(a). This proposed amendment is not a substantive change from the current Guidelines, which require the lead agency to file a notice of determination after deciding to carry out or approve each phase. (CEQA Guidelines, § 15075(a).) The amendment is intended to make the notice of determination filing requirements for negative declarations more consistent with the notice of determination filing requirements for EIRs (see CEQA Guidelines § 15094), to clarify the contents and format of the notice of determination and to ensure consistent implementation of with sections 21108 and 21152 of the Public Resources Code.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003; Department of Transportation, Gary R. Winters, October 27, 2003; California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters state that the phrase "by the public agency" should be deleted from the end of the first sentence.

Response: The Resources Agency agrees with this comment, and has modified the proposed amendment in accordance with section 11346.8(c) of the Government Code.

Section 15075(b)(1)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter supports the inclusion of the State Clearinghouse number on the notice of determination, but requests the addition of an explicit statement that the revisions are not intended to upset the substantial compliance rule.

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15075(b)(1). The proposed amendment conforms structurally to the existing section which identifies, in mandatory terms, the contents of a notice of determination. Nothing in the proposed amendment changes the existing interpretation of the substantial compliance rule.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter states that the phrase "draft negative declaration" should be replaced with "proposed negative declaration."

Response: The Resources Agency agrees with this comment, and has modified the proposed amendment in accordance with section 11346.8(c) of the Government Code.

Section 15075(b)(6)

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests the phrase "whether a mitigation monitoring plan/program was adopted" should be changed to "whether a mitigation monitoring plan/program was *or will be* adopted." Commenter believes that this addition would allow the lead agency the flexibility to work with resource agencies in developing a mitigation monitoring plan at a more appropriate time.

Response: Agency disagrees with this suggested change. Section 21081.6 of the Public Resources Code requires an agency to adopt a mitigation monitoring or reporting program at the time the agency adopts a mitigated negative declaration in conjunction with project approval. See Guidelines section 15097(a) and section 21081.6 of the Public Resources Code. Commenter's proposed change incorrectly suggests this statutory requirement could be deferred, and therefore Agency declines to accept this comment.

Section 15075(e)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003; Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenters would revise this section to state that a "notice of determination filed with the county clerk is *required to be* available for public inspection."

Response: The proposed amendment is intended to bring the Guidelines into conformity with section 21152 of the Public Resources Code. Agency agrees with the commenter that an additional minor change is needed to achieve this objective. In amendments proposed pursuant to section 11346.8(c) of the Government Code, Agency proposed the following language: "Notices of determination filed with the county clerk *shall be* available for public inspection." The change, although not exactly what the commenter suggests, is consistent with the commenter's suggestion.

Section 15075(g)

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed revision but suggest two changes: (1) replacing "filing" with "posting;" and, (2) replacing "and the posting of such notice" with "notice."

Response: Agency has considered commenters' suggestion and agrees that further clarification is needed in Guidelines sections 15075 and 15094 to distinguish between local lead agency and state lead agency practice. In amendments proposed pursuant to Government Code section 11346.8(c), Agency has revised this section to provide:

> (g) The filing of the notice of determination *pursuant to subsection (c) above for state agencies* and the *filing and* posting of *the* notice *of determination pursuant to subsections (d) and (e) above for local agencies***,** start a 30-day statute of limitations on court challenges to the approval under CEQA.

This section reflects the different limitations period for challenging an EIR or negative declaration as indicated by the court in *Citizens of Lake Murray Area Assn. V. City Council,* 129 Cal. App. 3d 436 (1982). Section 21167(b) of the Public Resources Code provides that "[a]ny action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days from the date of the *filing* of the notice required by subdivision (a) of section 21108 or subdivision (a) of section 21152." (emphasis added)

Section 21108(a) of the Public Resources Code provides that whenever a *state* agency approves or determines to carry out a project which is subject to CEQA, "it shall file a notice of that approval or that determination with the Office of Planning and Research."

Section 21152(a) of the Public Resources Code provides that whenever a *local* agency approves or determines to carry out a project subject to CEQA, "it shall file notice of such approval or such determination with the county clerk of the county, or counties, in which the project will be located."

Despite the plain language of Sections 21167(b) and 21152(a), *Citizens of Lake Murray Area Association* ruled that the 30-day period for *local* agencies did not start running until the day the notice is *posted* in the office of the county clerk. However, *Citizens of Lake Murray Area Association* did not consider the time period necessary to trigger the statute of limitations for a *state* agency. In light of the plain language of sections 21167(b) and 21108(a), and the absence of any judicial decision providing a different interpretation of such sections, there is no basis for Agency to promulgate Guidelines that change the event that triggers the limitations period for state agencies.

Accordingly, Agency's proposed amendment to the Guidelines provides that the 30-day statute of limitations on court challenges begins to run for state agencies when a notice of determination has been filed, and for local agencies when a notice of determination has been filed and posted.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter recommends that the words "and the posting" be deleted from the proposed amendments. The section would state: "The filing of the notice of determination of such notice starts a 30-day statute of limitations on court challenges to the approval under CEQA."

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to the October 27, 2003 comments by Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, on this section.

SECTION 15082. Notice of Preparation and Determination of Scope of EIR.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed changes to this section.

Response: Agency notes this support of the proposed amendments.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003.

Summary: Commenters suggest that section 15082 include a requirement that a notice of a scoping meeting be advertised twice in a newspaper of general circulation, at least 30 days prior to the meeting and at least 7 days prior to the meeting.

Response: Agency does not believe the commenters' statements warrant a change to the proposed amendments. Commenters' remarks do not directly address the specific amendment proposed by Agency, but propose a change that is beyond the scope of this rulemaking. Nor does Agency agree with the suggested requirement for newspaper advertisement of a scoping meeting. The purpose of scoping and the scoping meeting is to solicit comments from public agencies that may have jurisdiction by law over the project, not to consult with the public generally (see Pub. Resources Code §§ 21083.9, 21080.4, 21104, and 21153.)

Section 15082(a)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter recommends that the requirement for describing the location of a project be consistent throughout the Guidelines and that section 15082(a)(1)(B) should be amended to state: "The location of the project indicated either on an attached map (preferably a copy of a U.S.G.S. 15' or 7 ½ ' topographical map identified by quadrangle name) or by street address or nearest cross street for a project in an urbanized area."

Response: Agency concurs with the recommendation to standardize the method for identifying a project's location. In amendments proposed pursuant to Government Code section 11346.8(c), Agency proposed that section 15082(a)(1)(B) be amended to state: "Location of the project (either by street address and cross street, for a project in an urbanized area, or by attaching a specific map…." Agency also proposed conforming similar changes to sections 15062(a)(2), 15085 (b)(2), and 15094(b)(1).

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter suggests that the word "affected" be inserted in the first sentence of section 15082(a) to describe a trustee agency.

Response: Agency does not believe that commenter's suggestion warrants a change to 15082(a). The criterion for deciding which trustee agencies should receive a Notice of Preparation is not whether the trustee agency is affected, but rather, whether a natural resource over which the trustee agency has jurisdiction might be affected. (Pub Resources Code § 21080.4(a).) (See CEQA Guidelines § 15386.)

Summary: Commenter suggests that section 15082(a)(1)(B) be revised to include a requirement that the project location be described by section, township and range, for projects in rural areas where there is no street address.

Response: Agency agrees that project location should be described in a consistent manner when the project is located in a rural area and there is no street address. In amendments proposed pursuant to section 11346.8(c) of the Government Code, Agency proposed a change in the language of section 15082(a)(1)(B) to state that the location of a project may be described "either by street address and cross street, for a project in an urbanized area, or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name." Identifying a project on a 15 minute or 7.5 minute U.S.G.S. topographical map will allow the section, township and range to be determined.

Name/Date: Planning Resources, Sandra Genis, October 27, 2003.

Summary: Commenter suggests the addition of language to section 15082(a) requiring that the Notice of Preparation be sent to "any entity who would normally receive notice of the proposed project pursuant to Title 7 of the Government Code or pursuant to local ordinances."

Response: Agency does not believe commenter's remarks warrant a change to section 15082. The suggested language goes beyond the statutory requirements for distributing a Notice of Preparation. Section 21080.4(a) of the Public Resources Code requires a Notice of Preparation to be sent only to responsible and trustee agencies, not the public generally. The reference to Title 7 (which is the entire state planning and zoning law) is so broad as to be vague and unclear. There are numerous and varied requirements for notice within Title 7, including notice of public hearing which requires publication in a newspaper of general circulation, direct mailing to property owners and occupants, and/or posting of notice on the project site. Requiring that a Notice of Preparation be publicized in the same manner as a notice of a public hearing would go beyond the requirements of section 21080.4 of the Public Resources Code. Nor is it necessary to require in the CEQA Guidelines that lead agencies comply with local ordinances.

Section 15082(c)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter recommends that the format of section 15082(c) be modified by splitting the first paragraph under 15082(c), after the word "Meetings.", and placing it into a new subsection (1).

Response: Agency does not believe that commenter's remarks warrant a change to section 15082(c). The meaning of section 15082(c) is clear without the suggested change in format.

Summary: Commenter states that the proposed change to section 15082(c)(1) implies that the requirement for a scoping meeting applies only to the EIR process. Commenter requests clarification in the Guidelines regarding the applicability of the scoping meeting requirement to negative declarations.

Response: Agency agrees that the requirement for a scoping meeting applies only when an EIR will be prepared, and does not apply to negative declarations. For this reason, the language requiring at least one scoping meeting has been added only to section 15082, and not to other sections of the Guidelines.

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter states that section 15082(c)(1) is confusing because it implies that there are two separate requirements for scoping meetings; one requirement in section 15082 and another in section 15063(h). Commenter suggests that this section should be rewritten to state that for certain projects, a scoping meeting pursuant to 15063(h) is required.

Response: In accordance with Government Code section 11346.8(c), Agency has withdrawn the proposed change to section 15063(h) which would have required a scoping meeting at the initial study stage of review. Agency has also deleted the reference to 15063(h) from section 15082. This change makes it clear that a scoping meeting is required only when an EIR will be prepared.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that a new subsection (E) be added under 15082 (c)(1), requiring lead agencies to provide notice of a scoping meeting to transportation planning agencies and other agencies which have transportation facilities that could be affected by the project. Commenter cites section 21081.7 of the Public Resources Code as authority for their suggestion.

Response: Agency does not believe the Commenter's statements warrant a change to the proposed amendments. Commenter's remarks do not directly address the specific amendment proposed by Agency, but propose a change that is beyond the scope of this rulemaking.

Name/Date: County of Santa Barbara, Richard A. Kentro, October 27, 2003.

Summary: Commenter states that section 15082(c)(1) is redundant because the requirement for a scoping meeting is already included in section 15063(h). Commenter recommends that the requirement for a scoping meeting be retained in section 15082(c) but deleted from section 15063(h). Commenter also recommends that the notice requirements for scoping meeting be the same as notice requirements for public review of a draft EIR.

Response: Agency concurs with the recommended removal of the scoping meeting requirement from section 15063 and, in amendments proposed pursuant to section 11346.8(c) of the Government Code, Agency has made this change, together with conforming changes to section 15082(c)(1). However, Agency disagrees with the suggestion that notice requirements for a scoping meeting be the same as for a draft EIR, for the following reasons. First, the notice requirements for a draft EIR include posting of a notice by the county clerk for at least 30 days in addition to one or more of the following methods: posting of a notice in a newspaper of general circulation, posting on the project site, or direct mail to all adjacent property owners and occupants. The purpose of scoping and the scoping meeting is to solicit comments from public agencies that may have jurisdiction by law over the project, not to consult with the public generally (see

Pub Resources Code §§ 21083.9, 21080.4, 21104, and 21153.) However, lead agencies may, and many do, go beyond the minimum requirements of the law to provide notice of a scoping meeting to the public. See Agency's responses to comments on section 15082 by Defenders of Wildlife and Sierra Club, dated October 27, 2003, and Planning Resources, dated October 27, 2003

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters suggest that the first sentence in section 15082(c)(1) be modified to refer only to section 15063, not section 15063(h).

Response: Consistent with Government Code section 11346.8(c), Agency has withdrawn its proposed amendments to section 15063(h), and has deleted the reference to section 15063(h) from section 15082(c)(1). See Agency's response to comment on section 15082 from the American Planning Association, California Chapter, dated September 22, 2003.

Name/Date: Planning Resources, Sandra Genis, October 27, 2003.

Summary: Commenter suggests that section 15082(c) be revised to require that the lead agency provide notice of a scoping meeting "at least ten days prior to the scoping meeting and shall publish notice of the proposed meeting in a newspaper of general circulation."

Response: Agency does not believe that commenter's remarks warrant a change to section 15082. Commenter's suggestion requiring publication of a notice of a scoping meeting to the general public in a local newspaper exceeds statutory requirements. See Agency's responses to comments on section this issue from Defenders of Wildlife and Sierra Club dated October 27, 2003, and County of Santa Barbara dated October 27, 2003.

Section 15082(d)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter suggests deleting the provision in section 15082(d) requiring the State Clearinghouse to ensure a timely response from state agencies to the lead agency because it is unrealistic to expect the State Clearinghouse to compel action by state agencies. Commenter suggests replacing this provision with new language making the State Clearinghouse responsible for "timely receipt" of the Notice of Preparation by state agencies and "timely transmission" of all state agency comments to the lead agency.

Response: Agency has not proposed to amend the Guidelines language providing that the State Clearinghouse "will ensure" that the state responsible

agencies and trustee agencies reply to the lead agency within the 30-day time period. Therefore, commenter's suggestion is beyond the scope of this rulemaking. Agency may consider these comments in the next rulemaking, because Agency agrees that the State Clearinghouse cannot compel state agencies to respond to a Notice of Preparation, much less in a timely manner. However, Agency does not agree with commenter's proposed revisions, because by the same token, the State Clearinghouse cannot be held responsible for either timely receipt of the Notice of Preparation or timely transmission of state agency comments. Moreover, lead agencies are required by law to send a copy of the Notice of Preparation directly to each state responsible and trustee agency, via certified mail or other method that provides a record of receipt (see Pub. Res. Code § 21080.4(a) and CEQA Guidelines §15082(a)) and the statute and guidelines already require state responsible and trustee agencies to reply to the lead agency with comments within 30 days of receiving the Notice of Preparation (see Pub. Res. Code § 21080.4(a) and CEQA Guidelines §15082(b)).

Name/Date: Bay Area Council, October 27, 2003.

Summary: With respect to section 15082(d), commenter states that the State Clearinghouse has no jurisdiction over other agencies and therefore the Clearinghouse will not be able to ensure that those agencies act in the time allotted. For this reason, commenter does not support this portion of the amendment.

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to the October 27, 2003 comments of Best, Best and Krieger LLP on this issue.

SECTION 15085. Notice of Completion.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed changes to this section.

Response: Agency notes this support of the proposed amendments.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters recommend that the Notice of Completion form require complete contact information for the person to whom comments should be sent, including the person's name, title, street address, telephone number, fax number, and email address. In addition, the commenter recommends that the Notice of

Completion contain the title of the proposed project, and the State Clearinghouse identification number.

Response: Agency does not believe the commenters' remarks warrant a change to proposed section 15085. Although requiring clear project and contact information may be helpful, commenters' suggestion is beyond the scope of this rulemaking. Agency may consider these proposals in connection with future rulemakings.

Section 15085(a)

Name/Date: County Sanitation Districts of Los Angeles County, Felicia A. Ursitti, October 23, 2003.

Summary: Commenter states that the location requirement in section 15085(a) should be made consistent with the draft EIR location requirement in section 15124 that requires the precise location and boundaries of the proposed project to be shown on a detailed map as well as a regional map.

Response: Agency does not believe that commenter's remarks warrant a change to proposed section 15085(a). The level of detail required for an EIR project description is far greater than that required in a notice of completion. The notice of completion is intended to be a simple form, typically one page in length, to make the public aware that an EIR has been completed. The project location information required in a notice of completion must therefore be brief.

Section 15085(b)(2)

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter recommends clarification of section 15085(b)(2), which would allow the proposed project location to be identified by section, township and range, if the project is located in a rural area where there is no street address.

Response: Agency agrees that project location should be described in a consistent manner when the project is located in a rural area and there is no street address. In amendments proposed pursuant to Government Code section 11346.8(c), Agency proposed a change in the language of section 15082(a)(1)(B) to state that the location of a project may be described "either by street address and cross street, for a project in an urbanized area, or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name." This change is consistent with the proposed amendment to section 15085(b)(2). Identifying a project on a 15 minute or 7.5 minute U.S.G.S. topographical map will be sufficient to identify

the location of a project, and will allow the section, township and range to be determined. See Agency's response to comments on section 15082(a)(1)(B) from The Metropolitan Water District of Southern California, dated October 16, 2003.

Section 15085(c)

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter recommends that the purpose of the Notice of Completion form in Appendix L be clearly identified in section 15085(c) as a transmittal form for local review.

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15085(c). Agency notes that the intent of Appendix L, which is to provide a notice of completion form which local agencies can use in their local review process for a draft EIR, is apparent from the language in section 15087(a). Commenter's suggestions are beyond the scope of this rulemaking. However, Agency may consider this proposal in connection with future rulemakings.

SECTION 15087. Public Review of Draft EIR.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed changes to this section.

Response: Agency notes this support of the proposed amendments.

Section 15087(a)

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter suggests that this section reference Appendix C, in addition to the reference to Appendix L.

Response: Commenter's suggestion highlights the fact that section 15087(a) refers to both the public notice of the availability of a draft EIR and the notice of completion sent to OPR. However, the language in this section focuses on the public notice of the availability of a draft EIR, and Agency's proposed amendment is limited to clarifying the existing language by providing a sample form of that public notice in Appendix L. (Appendix C is the standardized form to be used

when sending documents to the State Clearinghouse.) Therefore, the commenter's proposed amendment is beyond the scope of this rulemaking. However, Agency may consider this proposal in connection with future rulemakings.

SECTION 15088. Evaluation of and Response to Comments.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed amendment to this section.

Response: Agency notes this support of the proposed amendment.

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter states that any objection to the adequacy of responses to comments must be brought to the attention of the lead agency prior to the approval of a project. Therefore, commenter suggests that this section be amended not only to make proposed responses available to commenting agencies 10 days prior to certifying the EIR, but also to give 10 days notice of all other responses to all other commenters.

Response: Agency does not believe commenter's remarks warrant a change to proposed section 15088. Commenter's suggestion is beyond the scope of this rulemaking. The proposed amendments are intended to bring the Guidelines into conformity with the requirement in section 21092.5(a) of the Public Resources Code that a lead agency must provide a written response to comments made by a public agency at least ten days prior to certifying an EIR. A lead agency is not statutorily required to provide a 10-day notice to all commenters of responses to comments.

Name/Date: Natural Resources Defense Council, Jan Chatten-Brown, October 27, 2003.

Summary: Commenter suggests deleting the word "proposed" before the word "response" in the proposed amendment, given the routine lead agency practice of providing commenting public agencies with a copy of the Final EIR as a method of meeting the statutory obligation in section 21092.5 of the Public Resources Code.

Response: Agency does not believe that commenter's remarks warrant a change to proposed section 15088. The proposed amendment brings the Guidelines into conformity with the statutory language of section 21092.5(a) of the Public Resources Code. This language does not affect the existing lead

agency practice of providing public agencies with a copy of the final EIR as a method of providing a written proposed response as required by the statute.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that the proposed revision should clarify the meaning of "provide" to include guidance on whether mailing is adequate, or whether responses must be sent in a manner that ensures receipt at least 10 days prior to the certification of an EIR.

Response: Agency does not believe that commenter's remarks warrant a change to proposed section 15088. The purpose of this proposed amendment is to make the Guidelines conform to section 21092.5 of the Public Resources Code. Commenter's suggestion is outside the scope of the proposed rulemaking. Agency may consider this proposal in connection with future rulemakings.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter supports this change and any other changes that are necessary to make the Guidelines internally consistent.

Response: Agency notes this support of the proposed amendments.

SECTION 15088.5. Recirculation of an EIR Prior to Certification.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed amendments.

Response: Agency notes this support of the proposed amendment.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter suggests that Agency provide a sample Notice of Recirculation form.

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15088.5. Although creation of an additional sample form may be helpful, this suggestion is beyond the scope of this rulemaking. Agency may consider this proposal in connection with future rulemakings.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera;

Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters assert that the proposed language is inconsistent with language used elsewhere in the Guidelines, which do not refer to recirculation of a "draft EIR" but recirculation of the revised document.

Response: Agency agrees with the commenters and, in amendments proposed pursuant to Government Code section 11346.8(c), Agency has deleted the word "draft" from 15088.5(f)(3), clarifying that the comments are on the prior EIR or the revised EIR.

Name/Date: Sempra Energy, October 27, 2003.

Summary: Commenter suggested deleting subsection (f)(3) because it allows an entire EIR to be opened up for a comment based on a change to a specific section. Commenter contends it was not the intent of CEQA to reopen an EIR for comment based on an insignificant change to a specific section of that EIR.

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15088.5. The existing language of section 15088.5(f)(2) gave the lead agency discretion to determine the scope of the comments on a recirculated document. Agency's proposed amendment requires that the notice of recirculation indicate whether the lead agency has exercised its discretion to require reviewers to limit their comments to the revised chapters or portions of the recirculated EIR. Therefore, the commenter's suggestions are outside the scope of this rulemaking. Moreover, Agency believes it is appropriate for lead agency to exercise its discretion in this regard. Since recirculation is triggered only when "significant new information" is added (per section 15088.5(a)), the changes by definition would not be insignificant and additional public review would be necessary and appropriate.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters generally support the revision, but suggest that the proposed amendments require notice to all adjacent property owners, whether they commented on the draft EIR or not, consistent with requirements of section 21092.2 of the Public Resources Code.

Response: Agency does not believe the commenters' remarks warrant a change to proposed section 15088.5. This suggestion goes beyond the scope of the proposed amendment and is not consistent with section 21092.2 of the Public Resources Code. Section 21092.2 does not require notice to all adjacent owners, but only those persons who have requested notice.

SECTION 15094. Notice of Determination.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter recommends that the phrase “by the lead agency” be deleted from the end of section 15094(a) because it is duplicative.

Response: The Agency agrees with the commenter and, in amendments proposed pursuant to Government Code section 11346.8(c), Agency has deleted this phrase.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter suggests that the requirements for describing the location of a project be consistent throughout the Guidelines. Commenter states that sections 15094(b)(1), as well as sections 15062(a)(2), 15082(a)(1)(B), and 15085 (b)(2), should be changed to be consistent with respect to required project location information. Suggested language is provided, consistent with the language proposed by Agency in sections 15062 and 15082.

Response: Agency agrees that the requirements for describing the project location should be consistent in appropriate sections throughout the Guidelines. In amendments proposed pursuant to Government Code section 11346.8(c), Agency revised sections 15094(b)(1), 15062(a)(2), 15082(a)(1)(B), and 15085 (b)(2) to make the required project location information consistent.

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003. Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenters suggest a grammatical change in section 15094(e), to make it clear that the notice of determination filed with OPR “is required to be” available for public inspection and posted for at least 30 days.

Response: Agency agrees with the commenter that an additional minor change is needed. In accordance with section 11346.8(c) of the Government Code, Agency has replaced the word "is" with "shall be." This change is consistent with the commenter's suggestion.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that for clarification and consistency with section 15075, the title of section 15094 should be changed to “Notice of Determination on a Project for Which an EIR Has Been Approved.” Commenter also requests that 15094(b)(6) be revised to reflect the fact that mitigation monitoring plan/programs are not always adopted by the time a Notice of

Determination is filed. Commenter suggests that the phrase "whether a mitigation monitoring plan/program was adopted" be changed to "whether a mitigation monitoring plan/program was *or will be* adopted."

Response: Agency does not believe commenter's remarks warrant a change to proposed section 15094. The title suggested by the commenter is beyond the scope of this rulemaking. Agency may consider this proposal in connection with future rulemakings. Agency declines to accept the suggested change to section 15094(b)(6) because it would improperly authorize deferral of statutory mitigation monitoring requirements. See Agency's response to comments from the Department of Transportation, Gary R. Winters, October 27, 2003 on section 15075(b)(6).

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenter recommends deleting the duplicative phrase "by the lead agency" from section 15094(a). In addition, without providing an explanation for the proposed change, the commenter also recommends changing the phrase in section 15094(c) and (d), from "the lead agency shall file the notice" to "the notice shall be filed."

Response: In accordance with section 11346.8(c) of the Government Code, Agency has deleted the duplicative phrase "lead agency" from the end of section 15094(a). However, Agency declines to accept use of the phrase "the notice shall be filed" because this change does not add to the clarity of this section.

SECTION 15097. Mitigation Monitoring or Reporting.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003; Association of Environmental Professionals, Dwight Steinert, October 1, 2003; Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters concur with the proposed amendments to section 15097.

Response: Agency notes this support of the proposed amendment.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter suggests that the scope of this section be restricted to reporting transportation information from a mitigation or monitoring plan only where there are impacts to Caltrans facilities.

Response: Agency believes no changes to the proposed amendments are warranted by commenter's remarks. The proposed amendment simply adds the requirement that the transportation information from specified covered projects be reported to Caltrans, as well as to regional transportation planning agencies. The amendment tracks the language of the statutory requirement for reporting this information, found in section 21081.7 of the Public Resources Code. That statute also requires Caltrans to adopt guidelines for the submittal of such information to Caltrans, just as regional transportation agencies are required to adopt such guidelines under the current regulation.

Section 15126.4. Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects.

Section 15126.4(a)

Agency has withdrawn all proposed amendments for subsection 15126.4(a). The following are summaries of comments made regarding the initially proposed amendments to this subsection. No response to these comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003. American Planning Association, California Chapter, Vince Bertoni, September 22, 2003. Sempra Energy, October 27, 2003.

Summary: Commenters suggest the following change to 15126.4(a)(4): "Mitigation measures must be consistent with all applicable constitutional ~~or~~ *and* statutory requirements."

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Regarding the deletion of case citations in 15126.4(a), commenter requested further clarification as to when Agency believes that principles from *Nollan v. California Coastal Commission,* 438 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) do not apply and why Agency believes that regulatory takings law could be perceived as only applying to CEQA. Commenter cites Agency's Initial Statement of Reasons for Regulatory Action on section 15126.4: "Moving the citations from the text is intended to avoid the potential misperception that these cases apply to all mitigation measures or that they have a special character unique to CEQA."

Section 15126.4(b)(2)

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter suggests that the language in section 15126.4(b)(2) should be changed from "in some circumstances" to "normally."

Response: Agency does not believe that commenter's remarks warrant a change to proposed section 15126.4(b)(2). The suggested changes to section 15126(b)(2) go beyond the scope of this rulemaking.

Section 15126.4(b)(3)(C)

Name/Date: Susan Brandt-Hawley; October 27, 2003.

Summary: Commenter states that any discussion of curation (as is proposed in subdivision (b)(3)(C)) should also discuss analysis and reporting of the excavation and its results. Commenter states that curation is not really a mitigation, but is the end product of any excavation that removes material.

Response: The Agency believes no changes to the proposed amendment are warranted by commenter's remarks. Proposed amendment indicates only that curation *may* be an appropriate mitigation measure if artifacts must be disturbed during project construction. At this time, Agency is not proposing to constrain a lead agency's discretion regarding any analysis and reporting that may accompany curation. Agency disagrees that curation is merely the end product of an excavation, as curation requires certain steps be taken to preserve artifacts after they are removed from the ground. Thus, Agency declines commenter's suggestions.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter suggests the following language for 15126.4(b)(3)(C): If an artifact *that is determined to be a unique archaeological resource* must be removed during project excavation or testing…."

Response: Agency believes that no changes to the proposed amendment are warranted by commenter's remarks. Agency does not agree with commenter's suggestion that a lead agency may consider curation as an appropriate mitigation only for "unique archaeological" resources. Curation may be appropriate mitigation for other artifacts as well. For example, section 15064.5(c) provides guidance on how lead agencies should evaluate archeological resources that may also be historical resources. In addition, section 15126.4(b)(3) recognizes that some historical resources are of an archeological nature and directs public agencies to seek to avoid damaging effects on such historical resources whenever feasible. Agency therefore declines to make the proposed change to this section.

Name/Date: Native American Heritage Commission, Larry Myers, October 2, 2003.

Summary: Commenter states that Native Americans are concerned about the treatment and disposition of artifacts removed from Native American cultural sites during the development of projects subject to CEQA. Commenter states that the silence of the CEQA Guidelines on curation potentially leaves valuable objects open to trafficking on the Native American art market, jeopardizes their long-term preservation, and makes them unavailable to their culturally-affiliated descendents. Commenter states that when it recommends mitigation measures for curation, it requests that culturally-affiliated Native American individuals participate in any decision regarding the selection of a curation facility for artifacts to be curated and decisions regarding the display and interpretation of Native American artifacts so they are treated in a culturally sensitive manner.

Response: Agency has adopted language stating that curation may be an appropriate mitigation measure for removal of artifacts. Agency appreciates commenter's suggestion that it may be desirable for culturally-affiliated Native Americans to be consulted regarding selection of a curation facility. However, Agency believes it appropriate to leave decisions about consultation to the lead agencies. The individual environmental review processes will provide those agencies with valuable information about consultation for each specific project.

Name/Date: Society for California Archaeology, Ken Wilson, February 10, 2001. Assembly, California Legislature, Howard Wayne, February 22, 2001. San Diego Archeological Center, Tim Gross, October 24, 2003. San Diego Archeological Center, public testimony by Courtney Coyle, October 6, 2003. Save Our Heritage Organization, Bruce Coons, October 20, 2003.

Summary: Commenters support the proposed amendments regarding curation.

Response: Agency notes this support of the proposed amendment.

Name/Date: Carmen Lucas, October 2, 2003. Carmen Lucas, public testimony by Courtney Coyle, October 6, 2003.

Summary: Commenter supports the proposed amendment to section 15126.4(b)(3)(C). Commenter provided letters from Society for California Archaeology, Ken Wilson, February 10, 2001 and Assembly, California Legislature, Howard Wayne, February 22, 2001, suggesting the addition of the following language in section 15126.4(b)(3)(C): "If an artifact must be removed during project excavation or testing, curation is an appropriate mitigation." Commenter also suggests that Agency develop curation guidelines in order to curtail improper treatment of archeological collections.

Response: Agency notes this support of the proposed amendment. Commenter's suggestion for more curation guidelines is beyond the scope of this rulemaking. Agency may consider this proposal in connection with future rulemakings.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters state that the purpose and context of this proposed revision is unclear. Commenters note the following:

1. Section 5020 of the Public Resources Code, a reference cited in the proposed revision, does not state that curation is mitigation for removal of *in situ* cultural resources, and it is not clear how curation relates to historic structures.
2. The amendment may be interpreted to mean that curation is sufficient mitigation when, in fact, it may be insufficient. Commenter also states that curation should be an end product of removal, not mitigation in and of itself.
3. The location of this amendment is inappropriate because it addresses mitigation, not determination of significance.

Response: Agency disagrees with commenters' suggestions and believes no changes to the proposed amendments are warranted by commenter's remarks. The amendments to section 15126.4(b)(3)(C) do not provide a complete discussion of appropriate mitigation for historical and archeological resources. The amendment merely recognizes that curation *may* be an appropriate mitigation measure for impacts that occur when excavation and artifact removal are necessary. Agency disagrees that the amendment may be interpreted as meaning that curation is sufficient mitigation. The language clearly states that curation "may be" an appropriate mitigation, not that curation is sufficient in every case. As noted in response to Susan Brandt-Hawley; October 27, 2003 on 15126.4(b)(3)(C), curation is not always "an end product of removal" and therefore, Agency believes that taking steps to preserve artifacts after they are removed from the ground constitutes a permissible form of mitigation.

Agency believes the location of this amendment is appropriate. As its title indicates, Section 15126.4 addresses "Mitigation Measures Proposed to Minimize Significant Effects." Subsection 15126.4(b)(3) provides mitigation and other factors that a lead agency should consider and discuss in an EIR for a project involving a historical resource of an archeological nature. Subsection (b)(3)(C) discusses data recovery through excavation. Agency's proposed amendment to this section would add the concept that if an artifact must be removed through excavation, the lead agency may consider and discuss curation as an appropriate mitigation measure. This new language is appropriately placed in a subsection (b)(3)(C) relating to mitigation factors that should be

considered with respect to historical resources where data recovery from excavation is involved.

SECTION 15130. Discussion of Cumulative Impacts

Agency has withdrawn all proposed amendments to section 15130 in this rulemaking. The following are summaries of comments made regarding the initially proposed amendments to this section. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter suggests adding the following language to the end of 15130(b)(2): "If the EIR uses existing conditions at the time of the Notice of Preparation as the baseline, the influence of past projects would normally be reflected in that baseline and listing of specific past projects in the EIR is not necessary."

Name/Date: Bay Area Council, October 27, 2003. Bay Area Council, public testimony by Andrew Michael, September 30, 2003.

Summary: Commenter states that the proposed amendments may create new problems and commenter remarks that changing "probable" to "reasonably foreseeable" may create inconsistency and confusion with case law and statutes. Commenter also states that the revision "should not abrogate the holding in *San Franciscans for Reasonable Growth* that projects that have been announced but not yet applied for are not "reasonably foreseeable" or "probable" future projects.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter indicates that section 15130(b)(3) provides helpful clarification, but that the phrase "(e.g., a subdivision)" in section 15130(b)(3)(D) is confusing.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters suggest that subdivision 15130(b)(3) be eliminated entirely because although the proposed changes solve the problem addressed by the court in *Communities for a Better Environment,* the solution creates several more problems. Commenters state that the term "reasonably

foreseeable" is "empty legal jargon" that would provide no useful guidance on what future projects must be included in a cumulative impacts analysis.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Commenter states that the examples of "probable future projects" do not adequately cover the breadth of projects that should be included. Commenter states that examples should be deleted**.**

Name/Date: Cassidy, Shimko, Dawson, Anna C. Shimko, October 27, 2003.

Summary: Commenter states that the revised text in 15130(b)(3) should be deleted. Commenter states that this deletion would meet the mandate of *Communities for a Better Environment*, and would avoid internal inconsistency within section 15130.

Name/Date: Planning Department, City and County of San Francisco, Paul Maltzer, October 21, 2003.

Summary: Commenter states that some of the suggestions in the list of "probable future projects" are undefined and speculative in nature and the Guidelines should provide better direction. Commenter also suggests deleting "those public agency projects for which money has been budgeted."

Name/Date: County Sanitation Districts of Los Angeles County, Felicia A. Ursitti, October 23, 2003.

Summary: Commenter states that the definition of "probable future projects" should be qualified to exclude projects for which meaningful information is not reasonably available at the time of the Notice of Preparation.

Name/Date: Planning Resources, Sandra Genis, October 27, 2003.

Summary: Commenter states that section 15130(b)(3)(A) should be clarified to mean that "probable future projects" includes projects where an application has been received at the time the comment period closes for the Notice of Preparation, instead of the time when the Notice of Preparation is released.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter suggests joining subdivisions (b)(3)(B) and (b)(3)(E). Commenter states that unless these subdivisions are joined a project identified in a plan, but not budgeted, is not likely to be carried out.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed changes to this section.

SECTION 15152. Tiering.

Agency has withdrawn all proposed amendments to section 15152 in this rulemaking. The following are summaries of comments made regarding the initially proposed amendments to this section. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/Date: Bay Area Council, October 27, 2003. Bay Area Council, public testimony of Andrew Michael, September 30, 2003.

Summary: Commenter states that the revisions make tiering far less useful and may result in agencies electing to prepare a new EIR and incorporate the previous EIR by reference. At the September 30, 2003 hearing, commenter stated that these revisions would force agencies to make an elaborate set of very specific and detailed findings before concluding that project impacts will be mitigated or avoided based on a prior EIR. Commenter states that this would eliminate streamlining benefits without resulting in better environmental review. Commenter also states that the revisions are contrary to the holding in *Communities for a Better Environment*, and should be rejected. In written comments, Commenter noted that the proposed language would not allow coverage from a prior EIR where a later project has significant unavoidable impacts. Commenter implies that this is contrary to *Communities for a Better Environment*, which held that it is the statement of overriding considerations – not the analysis – that is not specific enough to provide justification for a specific project.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter offers an overview of difficulties associated with implementing tiering. Commenter specifically recommends that it would be helpful to include revisions stating that: 1) tiering does not apply to subsequent activities that are part of a previously approved project; and 2) this section does not overrule precedent regarding when environmental review can be required for subsequent approvals that are part of a previously approved project.

Name/Date: Environmental Defense Center, Linda Krop, October 6, 2003.

Summary: Commenter states that the amendment appears to allow tiering only if impacts identified in the original EIR are fully mitigated. If that is the case,

commenter supports the proposed change; if not, commenter believes that the amendment must be clarified and re-circulated.

Section 15152(d)(1) – (d)(3)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter recommends deleting the requirement to identify the location of findings in subdivision (d)(2)(A), because findings are not publicly-distributed documents. Commenter also states that the language in proposed subdivision (d)(3) is difficult to understand and should be stated in the positive. Commenter asks about the intent of the section and the definition of "performance standard." Commenter also suggests deleting the word "however" from the last sentence of the subdivision.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter recommends deleting the word "formally" in subdivision (d)(2), such that a lead agency could determine that environmental effects were adequately analyzed in a previous EIR even if the examination was not "formal." In addition, commenter would add the phrase, "and could change the conclusions regarding the significance of impacts analyzed in the prior EIR" to subdivision (d)(3). This change would allow a lead agency to propose new mitigation measures for a later project based on an earlier EIR, even when new information is needed, provided that new information does not change the conclusions regarding the significance of the impacts identified in the prior EIR.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that subdivisions (d)(2)(C) and (d)(2)(D) are unworkable and should be re-written to require the lead agency to explain how the applicable mitigation measures address the impacts associated with the later project.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters provide a general discussion of tiering and *Communities for a Better Environment*. Commenters state that:

1. The proposed amendments would cause more problems than they solve and conflict with the statute because they require analysis of impacts that were analyzed in the prior EIR;

2. The proposed amendments delete two subdivisions that are consistent with statutory provisions and replace them with language that requires a new EIR if a project will result in a significant impact that cannot be mitigated to a less than significant level, even if that impact has already been adequately examined in a prior EIR and no new information exists;

3. The new procedural requirements for lead agencies seeking to tier environmental review will force agencies to make specific and detailed findings and will create new opportunities for agency error, creating a substantive burden that adds more uncertainty in the CEQA process. Commenters offer an example where a lead agency determines that no additional environmental review is required for a project. Commenters state that the proposed amendments would require the lead agency to produce an Initial Study and extensive documentation. Commenters also state that a new type of Initial Study would need to be considered, as the form in the appendix of the Guidelines may not be "appropriate" for this type of analysis;

4. Subdivision (d)(3) in combination with subdivision (f) arguably eliminates using a negative declaration to address impacts not examined in a prior EIR because(d)(3) bars a lead agency from adopting new mitigation measures (thereby avoiding the need for a second tier EIR) if the mitigation is designed to respond to impacts that were not previously known or anticipated in the prior EIR.

Name/Date: California Native Plant Society, Emily B. Roberson, October 24, 2003.

Summary: Commenter recommends that subdivision (d) be withdrawn. Commenter states that:

1. The sections are not clearly written, and they increase the likelihood that avoided and significant effects will occur due to a failure to fully analyze impacts or mitigation plans;

2. Subdivision (d)(1)(A) would allow changes to previous plans, policies, ordinances, or programs as the basis for excluding an impact from analysis even if the previous plan has not received public or scientific review;

3. Because "environment" is defined as "the area affected by the project", significant impacts should require EIR analysis regardless of whether a previous EIR or plan mitigates that impact. Commenter is concerned that the

prior EIR may cover a different geographic area than that affected by the new project or the prior EIR may be out of date;

4. Lead agencies would have sole authority to determine which impacts received full analysis in environmental documents tiered to previous EIRs, and these determinations would be based on information supplied by project proponents who have an interest in reducing the scope of EIRs.

Name/Date: Planning Department, City and County of San Francisco, Paul Maltzer, October 21, 2003.

Summary: Commenter states that two of the amendments are very confusing. Specifically, commenter contends that:

1. In subdivision (d)(1)(B), it is not clear which project proponent – that of the earlier project or that of the later project – must agree to the conditions referenced in the subdivision. Commenter states if it is the former, it is difficult to get project proponents of earlier projects to agree to site-specific revisions without a specific development proposed. If it is the latter, commenter states that the language in subdivision (d)(1)(B) should also be included in subdivision (d)(2) or as a separate section under subdivision (d)(1);

2. The language of subdivision (d)(3) appears to invalidate the language in subdivisions (d)(1) and (d)(2), and may be interpreted to preclude the use of earlier EIRs in almost every instance. Commenter is concerned that details about specific later sites or projects will not be known when the initial EIR is prepared, and, as a result, the question will arise as to whether the exercise of reasonable diligence could have resulted in the discovery of the ultimate development proposal. Commenter notes that site-specific conditions will be implemented differently for subsequent specific projects and can be based on broadly written mitigation measures, including performance standards which were included in the first EIR. As a result, commenter recommends that subdivision (d)(3) be narrowed and clarified.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003**.**

Summary: Commenters urge Agency to delete subdivisions (d)(2)(C) and (d)(3) from the proposed amendments. Commenters state that these provisions allow new mitigation measures for a project based on information in a prior EIR. According to commenters, because these measures were never reviewed in the previous EIR, they will never be certified as feasible and never publicly reviewed.

Name/Date: Planning and Conservation League Foundation, public testimony by Mary U. Akens, September 30, 2003.

Summary: Commenters state that the amendments to this section are confusing, especially with regard to using a prior EIR to develop new mitigation measures. Specifically, commenters indicate:

1. The proposed amendments will invite lead agencies to rely on stale data in assessing impacts that were not examined in the first EIR;

2. The amendments need to provide linkage between the impacts identified in the prior EIR and the environmental review that is necessary for this project;

3. The amendments to subdivision (d)(2)(C) fail to require an explanation of the source of the information about the impact of the later project that is not examined in the prior EIR;

4. The amendments to subdivision (d)(3) fail to provide linkage between any performance standard adopted as part of a program, plan, policy, or ordinance that is relied upon in the subsequent EIR and the impacts occurring as a result of the later project.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003, Planning and Conservation League Foundation, public testimony of Mary U. Akens, September 30, 2003.

Summary: Commenters generally support the clarifying revisions to this section. However, they recommend several additional modifications, including:

1. Deletion of subdivision (d)(2)(C). Specifically, commenters state that subdivision (d)(2)(C) presupposes that a lead agency and applicant can agree to new mitigation measures based on information in the prior EIR. According to commenters, this leaves the public out of the process, who therefore have no opportunity to comment on the adequacy of the proposed mitigation measures.

2. Deletion of subdivision (d)(3). Commenters understand that subdivision (d)(3) is an attempt to address the problem of public review of the adequacy of a previously proposed mitigation measure in a later project, but commenters believe that this revision leaves the key determination to the subjective judgment of the project proponent or lead agency staff or environmental consultants.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter recommends that Agency retract the proposed deletion of subdivisions (d)(1) and (d)(2). Commenter states that the proposed

amendments go beyond the intent of the decision in *Communities for A Better Environment*. Commenter states that *Communities for a Better Environment* holds that a lead agency may not rely on a prior statement of overriding considerations, but does not hold that a lead or responsible agency is precluded from utilizing prior environmental analysis.

Name/Date: Planning Resources, Sandra Genis, October 27, 2003.

Summary: Commenter suggests that Agency add language to subdivision (d)(2) requiring the lead agency for the subsequent project to make copies available of the previously approved program, plan, policy, or ordinance and the associated environmental documents and findings.

Name/Date: San Francisco Bay Area Rapid Transit District, Thomas E. Margro, October 3, 2003.

Summary: Commenter expresses concern that the proposed amendments omit one category of impacts examined in a prior environmental analysis that are not required to be reexamined in a subsequent environmental analysis. Specifically, commenter believes that impacts that were determined in the prior environmental analysis to be insignificant without mitigation can and should be identified as impacts "adequately analyzed" in the prior assessment. Commenter notes that the proposed amendment is based on section 21094 of the Public Resources Code, which provides that a later environmental analysis must only examine significant effects. Commenter recommends adding a new subdivision, (d)(1)(C), to explicitly identify less than significant effects as those that need not be addressed in the subsequent environmental analysis.

Name/Date: Regents of the University of California, Office of the General Counsel, Alan C. Waltner, October 22, 2003.

Summary: Commenter states that these changes will discourage tiering and go beyond the language found in *Communities for a Better Environment.* Commenter is concerned about the effect this will have on the development of EIRs for the commenter's long range development plans and subsequent project-level environmental reviews. Commenter's specific proposals include amending subdivision (e) to state that tiering is available when the project is consistent with the program, policy or ordinance that was the subject of the prior EIR. Commenter argues that this change is needed to render subdivisions (e) and (d) consistent.

Section 15152(f)

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter states that the proposed changes to subdivision (f)(1) are not clear. Commenter suggests that subdivision (f)(1) be rewritten to state that an EIR is not required if a project is providing its "fair share" of cumulative impacts mitigation identified in a prior EIR, and the mitigation identified in that document for cumulative impacts reduced cumulative impacts to less than significant levels.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter notes that subdivision (f) appears to conflict with the language in subdivision (d) regarding the formation of new mitigation measures before preparing the tiered EIR.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that the amendments accurately address the court's holding in *Communities for a Better Environment*.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters state that subdivision (f) is inconsistent with the tiering statute because it requires that cumulative impacts be studied a second time in a second tier document any time they are significant and have not been eliminated through mitigation. Commenters contend that this results in a second EIR addressing an impact without having anything new to add, which contradicts the purpose of tiering.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: With regard to determining cumulative impacts in the tiering process, commenter refers to its comments on cumulative impacts for section 15064.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters generally support the clarifying revisions to this section. However, commenters note that under subdivision (f), subdivision (1) should be removed as it is not followed by any further numbered subdivisions.

Name/Date: Regents of the University of California, Office of the General Counsel, Alan C. Waltner, October 22, 2003.

Summary: Commenter states that these changes will discourage tiering and go beyond the language found in *Communities for a Better Environment.* Commenter is concerned about the effect this will have on the development of EIRs for commenter's long range development plans and subsequent project-level environmental reviews. Commenter's specific proposals include "retaining" subdivision (f)(3)(C), editing it to parallel language in proposed subdivisions (a) and (C). Commenter also proposes conforming edits to subdivisions (f) and (f)(1).

Section 15152(h)

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter states that subdivision (h) should be modified so that it is clear that the documents identified in (h)(1) – (4) are those that represent the prior environmental analysis, and that the documents identified in (h)(5) – (8) are those that represent the subsequent analysis.

SECTION 15183. Projects Consistent with a Community Plan, General Plan, or Zoning.

Agency has withdrawn all proposed amendments to section 15183 in this rulemaking. The following are summaries of comments made regarding the initially proposed amendments to this section. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/ Date: Bay Area Council, October 27, 2003; Bay Area Council, public testimony by Andrew Michael, September 30, 2003.

Summary: Commenter believes the proposed changes reduce the reliability of government decisions resulting in delay and excessive paperwork, without any benefit to the environment. Commenter believes that the amendment will cause a redundancy in the environmental review process, and will require a project's cumulative and offsite impacts to be analyzed even if they have already been analyzed in a previously certified EIR.

Name/ Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter suggests that the proposed amendment be clarified to explicitly state that it is not intended to overrule existing precedent regarding the limited circumstances under which further environmental review can be required for subsequent approvals that are part of a previously approved project.

Name/ Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters have two concerns with the amendments as originally proposed. Commenters object to deleting the last sentence from existing Guideline 15183(j) on the ground that it would make it more difficult to argue that cumulative impacts do not need to be studied a second time, when they have been subject to analysis in a previously certified EIR.

Commenters suggest adding language to subsection (c) that would include previously "adopted mitigation measures" as equivalent to the "uniformly applied development policies or standards" presently described in this subsection, which preclude the necessity of preparing a subsequent EIR on a project.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed changes to this section.

SECTION 15205. Review by State Agencies

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter supports the proposed changes to this section.

Response: Agency notes this support of the proposed amendments.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that the phrase "or mitigated negative declaration" to the end of the second sentence of proposed subsection (e), discussing which CEQA documents may or must be submitted to the State Clearinghouse with a "notice of completion form." This would mirror the language found in the first sentence of this subsection, in describing CEQA documents that must or may be submitted to the State Clearinghouse.

Response: Agency concurs with this recommendation. In amendments proposed pursuant to Government Code section 11346.8(c), Agency has added the phrase "or mitigated negative declaration" to the end of the second sentence of this subsection.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter opposes the proposed amendments to this subsection, asserting the amendments require, rather than simply allow, the use of the Notice of Completion form in Appendix C of the Guidelines.

Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. Section 21161 of the Public Resources Code requires a Notice of Completion form to be submitted to OPR. Section 15085(d) of the Guidelines further states, "where the EIR will be reviewed through the…State Clearinghouse, the cover form required by the State Clearinghouse will serve as the notice of completion." Because of the volume of Notices of Completion received by the State Clearinghouse, and the need to route both these notices and the accompanying CEQA documents to various state agencies based on their requests to review specific types of project documents, and the need to speed the processing of these documents, a standard form for the Notice of Completion is necessary. Uniformity is also helpful in giving clearer information to members of the public who have questions concerning the types of documents that have been submitted to the State Clearinghouse, and the types of environmental impacts covered within those documents. Use of a standard form is also necessary to provide a uniform basis for construction and maintenance of the CEQA database that the Clearinghouse is required to maintain pursuant to section 21159 of the Public Resources Code.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Planning and Conservation League Foundation, public testimony by Mary U. Akens, September 30, 2003.

Summary: Commenters suggest that the term "sufficient," referring to the number of copies of a completed EIR, or negative or mitigated negative declaration that must be submitted to the State Clearinghouse, is "vague and ambiguous." Commenters suggest that this subsection be reworded as follows:

1. Prior to the filing of a notice of intent to adopt a negative declaration, mitigated negative declaration, or notice of completion for a Draft EIR with the State Clearinghouse, the lead agency should contact the State Clearinghouse to determine the number of state agencies that will be reviewing the EIR or negative declaration.
2. The lead agency shall then submit the number of copies of the EIR or negative declaration or mitigated negative declaration the State Clearinghouse determines necessary for review by all responsible state agencies, trustee agencies, and state agencies that commented on the initial study (if any).

Response: Agency believes no changes to the proposed amendment are warranted by commenters' remarks. Section 21091 of the Public Resources Code specifically calls for a "sufficient" number of copies of draft environmental

documents to be submitted to the State Clearinghouse (Pub. Resources Code § 21091(a)-(b).) While subsection 15205(e) of the Guidelines previously called for ten copies of the noted environmental documents to be submitted, this fixed number of copies has often been too few in number to route to all of the state agencies requesting review copies. Conversely, ten copies have on occasion also turned out to be more copies than required, thus leading to expensive and time consuming reproduction of documents by lead agencies. The proposed wording of the subsection already alerts the lead agency of the need to contact the State Clearinghouse to determine the number of copies that will be "sufficient," and, as noted, the number of copies required should remain a flexible number.

SECTION 15206. Projects of Statewide, Regional, or Areawide Significance.

Section 15206(a)

Name/ /Date: Bay Area Council, October 27, 2003.

Summary: Commenter opposes the proposed changes to subsection (a)(1) because the change mandates the use of the Appendix C Notice of Completion form.

Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. See Agency's response to commenter's October 27, 2003 remarks on section 15205.

Name/ /Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003. Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed changes to this subsection.

Response: Agency notes this support of the proposed amendment.

Section 15206(c)

Agency has withdrawn all proposed amendments in subsection 15206(c). The following are summaries of comments made regarding the initially proposed amendments to this subsection. No response to these comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003. Bay Area Council, October 27, 2003. Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003. East Bay Regional Park District, Daniel Sykes, October 3, 2003. Defenders of Wildlife/Sierra Club, J. William Yeates, October

27, 2003. The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003. Planning Resources, Sandra Genis, October 27, 2003. Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenters remarked solely on the proposed language of new subsection (c) of this section. Best, Best & Kreiger and The Metropolitan Water District of Southern California both suggested that the section should be applicable only when an EIR is required. The Bay Area Council suggested that the section not apply when "it is already determined that an EIR is required." The Department of Transportation suggested that a new subsection be added to require that notice be given to transportation planning agencies. Defenders of Wildlife, Sierra Club and Planning Resources, suggested specific notice and publication requirements be added to the section. The East Bay Regional Park District and the Association of Environmental Professionals suggested that the application of this section be restricted to situations where it is likely that an EIR will be required.

SECTION 15252. Substitute Document.

Name/Date: Bay Area Council, October 27, 2003. California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; October 27, 2003.

Summary: Commenters oppose the proposed amendment to this section stating that it would add additional procedural requirements that "may provide an unusually high potential for error because they apply to review under a certified program, and agencies acting under a certified program may not be in the practice of referring back to CEQA for procedural requirements."

Response: This amendment specifies that when implementing a certified regulatory program, the lead agency shall file the Notice of Decision with the Secretary for Resources. This is an existing CEQA requirement set forth in section 21080.5(d)(2)(E) of the Public Resources Code. Agency agrees that agencies implementing certified regulatory programs may not always refer back to CEQA for procedural requirements, and believes that including this provision in the Guidelines will reduce the potential for error. Agency notes that regulatory programs that are certified by the Secretary of the Resources Agency pursuant to section 21080.5 of the Public Resources Code are still subject to requirements of CEQA other than those found in Chapters 3 and 4 and section 21167, except as provided in Article 2 of Chapter 4.5. (See Pub. Resources Code § 21080.5 (c).)

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenters express support for the proposed amendment of this section.

Response: Agency notes this support of the proposed amendment.

SECTION 15313. Acquisition of Lands for Wildlife Conservation Purposes.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003

Summary: Commenter supports the proposed clarification.

Response: Agency notes this support of the proposed amendment.

Name/Date: Department of Food and Agriculture, Steve Shaffer, October 29, 2003.

Summary: Commenter sets forth an analysis on how CEQA deals with agricultural resources. These remarks are based primarily on legislative policy statements regarding the importance of the agricultural industry set forth in section 1 of SB 850 (Chapter 812, Statutes of 1993), the CEQA definition of "agricultural lands" in section 21060.1 of the Public Resources Code, the definition of "Land evaluation and site assessment" in section 21061.2 of the Public Resources Code, and the agricultural resources section of the Environmental Checklist Form (Appendix G of the CEQA Guidelines), which identifies the Land Evaluation and Site Assessment Model (LESA) as an optional model for assessing impacts to agriculture and farm land. Commenter concludes that "the Legislature considers the loss of agricultural land (as defined, the cessation of agricultural use of good quality land for more than four consecutive years) to be a potentially significant impact to be addressed under CEQA." Based on this conclusion, commenter reasons that any change in use of agricultural land to a non-commodity producing state which could hurt the agricultural economy is a potentially significant impact to the agricultural "environment." Commenter states that such changes in use include not only "urbanization" but "land retirement for public open space," "wildlife habitat" and "parks." According to Commenter, even a less intensive use where "the farmland category would likely drop to Farmland of Local Importance" would be a "potentially significant environmental impact" because that would cause a change in the "agricultural land definition." Commenter also notes that section 15300.2 makes the categorical exemptions inapplicable when the cumulative impact of successive projects of the same type in the same place over time is significant,

or where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. Commenter asserts that the current language of section 15313 implies that the exemption applies only to acquisitions that preserve lands in their "natural condition." For these reasons, commenter condemns the use of categorical exemptions for "public acquisition of agricultural land for the restoration of wildlife habitat," as "an abuse of CEQA that needs to be addressed by changes to the Guidelines."

Commenter states that the proposed amendment of Class 13 does nothing to address this problem and instead would include acquisitions of lands "not in their natural condition," including agricultural lands. Commenter recommends amending this section to restrict its application to acquisitions (1) "to preserve the land in its natural condition;" and (2) where, according to the LESA model, "there will be no significant environmental effect on agricultural resources." Commenter also proposes additional revisions to exclude acquisitions "where there is a reasonable possibility that an existing open space use as defined by section 65560 of the Government Code will be adversely impacted."

In addition to commenting on the proposed amendment to Class 13, commenter also comments on the proposed amendment to Class 25. See comments below on 15325. In these comments, commenter proposes two modifications to Class 25 that would make it consistent with its proposed modification to Class 13.

Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. Agency recognizes commenter's mandate to protect and promote the industry of agriculture as an important policy consideration, but disagrees with commenter's position that under CEQA potential economic impacts to the agricultural industry is a category of "environmental impact," and thus any use of agricultural land for noncommercial purposes, such as restoration and preservation is a "potentially significant impact." Because an analysis of CEQA's applicability to agricultural land is outside the scope of the proposed amendments, Agency declines to make a detailed response to such comments.

With respect to commenter's more specific comments on section 15313, Agency declines to adopt commenter's proposed changes. Agency's proposed language seeks only to clarify an existing categorical exemption. The proposed amendments will avoid confusion about the qualifying language regarding "natural condition" and add structural clarity to the existing exemption in accordance with the original intent of the exemption and the last antecedent rule. The last antecedent rule recognizes that "relative or qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases, or clauses more remote, unless such extension or including is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act." (Black's Law Dictionary at p. 882 (West's Publishing, 6th Edition).) The special requirement

that access lands be in a "natural condition" does not extend to the preceding "clauses more remote." Unlike habitat preservation or the establishment of ecological preserves, an exemption for access to land and water could be read as including acquisitions for the purpose of, for example, road building. Because activities such as road building require physical changes associated with grading and paving, and may potentially lead to the access and development of previously undeveloped areas, it is appropriate that an exemption for acquisitions for access to public lands and waters should be qualified with a restriction stating that the purpose of the acquisition is to preserve the access land in a roadless or "natural" condition. This interpretation is consistent with the existing language of the Class 25 categorical exemption. That exemption, "Transfers of Ownership of Interest in Land to Preserve Existing Natural Conditions," includes acquisition, sale, or other transfer to both "preserve the existing natural conditions" and "allow restoration of natural conditions, including plant or animal habitats." (CEQA Guideline section 15325(a) and (c).) The prior determinations that the "[a]cquisition, sale or transfer of interests in land to allow restoration of natural conditions, including plant or animal habitats" does not have a significant effect on the environment supports Agency's clarifying amendment to the Class 13 exemption. For the reasons stated above, Agency declines to adopt commenter's proposed changes.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Commenter states that agricultural resources are part of the physical environment and that "[o]ne of the major principles of CEQA is to sustain the long-term productivity of the state's agriculture by conserving and protecting the soil, water, and air that are agriculture's basic resources." Thereafter, commenter asserts that Appendix G of the CEQA Guidelines provides "specific guidance on how to determine when an impact to an *agricultural resource* is significant." (Emphasis in original.) Commenter states the use of the Class 13 exemption by the State for habitat preservation and restoration projects on agricultural land has been unlawful. Quoting *Removing Barriers to Restoration*, a 2002 report to the Secretary for Resources regarding barriers to restoration projects, commenter states that habitat projects may have negative environmental impacts. Commenter asserts that the use of public funds to purchase "agricultural resources" and then prohibit agricultural use of the property "degrades the quality of the resource," and makes the property "non-viable." Commenter states that the "state's farms and ranches are not parks" and agricultural land must be kept in agriculture. Commenter states that habitat projects "may also degrade the quality and availability of other resources, like water and land." Commenter cites the relationship between wetlands and mercury methylation as an example of such alleged degradation, and attaches a copy of the *Sacramento Bee* article "Toxic dilemma" by Stuart Leavenworth (10/20/2003) to its comments. Commenter concludes by stating it "can only assume that the Resources Agency intends that the Class 25 and 13 exemptions

will only be used in very limited circumstances not involving the conversion of agricultural resources to non-agricultural use." Commenter's remarks provide no specific proposal for changes to the proposed Guidelines amendments.

Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. Agency disagrees with commenter's position that a "major principle" of CEQA is to protect agriculture, as an industry, against the perceived social and economic impacts of projects which may use agricultural land for noncommercial purposes, such as restoration and preservation. Because an analysis of CEQA's applicability to agricultural land is outside the scope of the proposed amendments, Agency declines to make a detailed response to such comments. Please see Agency's response to the California Department of Food and Agriculture comments of October 29, 2003, above. Class 13 and 25 categorical exemptions are based on past findings by Agency that these classes of projects do not have a significant effect on the environment. Commenter's disagreement with such findings is outside the scope of this rulemaking.

With respect to commenter's concern that impacts could be caused by mercury in the Sacramento-San Joaquin Delta, a lead agency would be required to consider any impacts that could be caused by a restoration project in that area pursuant to section 15300.2(c), which provides that if "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances," then a categorical exemption shall not be used. See also response to comments of California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003, on section 15333.

Finally, Agency does not agree with commenter's statement that "the Class 25 and 13 exemptions will only be used in very limited circumstances not involving the conversion of agricultural resources to non-agricultural use." Agency does not believe that the cessation of a commercial activity alone is an adverse physical impact to land and water. The change in use may result in economic and social impacts to the agricultural industry, but the Guidelines mandate that economic and social impacts shall not be treated as significant effects on the environment. (CEQA Guidelines section 15131(a).)

Name/Date: East Bay Regional Park District, Daniel Sykes, October 3, 2003. Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, September 24, 2003.

Summary: Commenters support the proposed amendment of section 15313.

Response: Agency notes this support of the proposed amendment.

SECTION 15325. Transfers of Ownership in Land to Preserve Existing Natural Conditions and Historical Resources.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter recommends modifying the revision by striking the language "or lands for park purposes."

Response: Agency believes no change to proposed section 15325 is warranted by the commenter's remarks. This proposed amendment does not alter the nature of this exemption for "transfers of ownership interests in land in order to preserve open space, habitat, or historical resources." Instead, the amendment would add to the list of examples of such transfers, those transfers "to preserve open space or lands for park purposes." The exemption remains limited to acquisitions or other transfers of ownership. It does not include "park development" or "park use." Furthermore, section 15300.2(c) prohibits the use of a categorical exemption "for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." For these reasons, Agency declines to modify the proposed amendments.

Name/Date: California Department of Food and Agriculture, Steve Shaffer, October 29, 2003.

Summary: Please see Agency's summary of the Department of Food and Agriculture's October 29, 2003 comment letter in section 15313, above. In addition to making general comments regarding CEQA's applicability to agricultural land, commenter proposes two modifications to Class 25. The first would exclude any transfer that "will adversely impact open space" as defined by the Williamson Act (Government Code section 65560), and the second would preclude transfers that would adversely affect "agricultural resources" as determined by mandatory use of the Land Evaluation and Site Assessment (LESA) model.

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Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. With respect to commenter's general statements regarding the status of agricultural lands under CEQA, see Agency's response to California Department of Food and Agriculture's October 29, 2003 letter in section 15313, above. Commenter's suggestions for amendments to section 15325 are outside the scope of the proposed amendments, and Agency declines to make them. Moreover, Agency disagrees that Class 25 should be amended to provide that a transfer of ownership of interests in land in order to preserve open space, habitat, or historical resources would no longer be categorically exempt if such transfer may affect the agricultural use of that land. The cessation of a commercial activity alone is not an adverse physical impact to

land and water. The change in use may result in economic and social impacts to the agricultural industry, but the Guidelines mandate that economic and social impacts shall not be treated as significant effects on the environment. (CEQA Guidelines section 15131(a).)

Name/Date: California Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that section 15325 be modified to require that the acquisition "include covenants to protect and perpetuate the character defining feature of the land, i.e. historic resources, open space, etc."

Response: Agency believes no change to proposed section 15325 is warranted by the commenter's remarks. CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible. (CEQA Guidelines § 15021(a).) Requiring covenants which "perpetuate the character defining feature of the land" may be an important policy consideration, but CEQA exemptions apply generally to the level of environmental review required by classes of projects and do not include contractual requirements Therefore, Agency declines to adopt commenter's proposed change to the amendments.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Please see Agency's summary of the Farm Bureau's October 27, 2003 general comments in section 15313, above. Commenter does not propose any specific change to section 15325, but states that it "can only assume that the Resources Agency intends that the Class 25 and 13 exemptions will only be used in very limited circumstances not involving the conversion of agricultural resources to non-agricultural use."

Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. With respect to commenter's general comments, please see Agency's response to the California Farm Bureau Federation's October 27, 2003 comments in section 15313, above. Agency does not agree that Class 25 and 13 exemptions can be used only in circumstances not involving the conversion of agricultural resources to non-agricultural use. The change in use may result in economic and social impacts to the agricultural industry, but the Guidelines mandate that economic and social impacts shall not be treated as significant effects on the environment. (CEQA Guidelines section 15131(a).) Because an analysis of CEQA's applicability to agricultural land is outside the scope of the proposed amendments, Agency declines to make a detailed response to such comments.

Name/Date: East Bay Regional Park District, Daniel Sykes, October 3, 2003.

Summary: Commenter states the proposed change to Class 25 is a good addition that will benefit many public agencies that protect and restore public lands.

Response: Agency notes this support of the proposed amendments.

Name/Date: Environmental Defense Center, Linda Krop, October 6, 2003.

Summary: Commenter supports this section "with the exception of the subsection (f), which exempts potential park development from environmental review." Commenter remarks that park development can result in many significant impacts such as traffic, air quality degradation, destruction of wetlands and other biological resources, noise, and aesthetics. Commenter suggests limiting application of the exemption to "passive park use" to ensure it is not applied to "structures, roads, ball fields, golf courses, equestrian facilities, etc."

Response: Agency believes no change to proposed section 15325 is warranted by the commenter's remarks. See Agency's response to Association of Environmental Professionals, Dwight Steinert, October 1, 2003, on this section. Agency declines to modify the phrase "park purposes" to "passive park use" as suggested.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Planning and Conservation League Foundation, public testimony of Mary Akens, September 30, 2003.

Summary: Commenters contend that the phrase "park purposes" should be prefaced by "public" and end with "consistent with preserving open space and habitat" to clarify this categorical exemption. Commenters are concerned that the word "park" is too vague and could be used to justify access such as putting in a parking lot.

Response: Agency believes no change to proposed section 15325 is warranted by the commenters' remarks. See Agency's response to Association of Environmental Professionals, Dwight Steinert, October 1, 2003, on this section..

Name/Date: Shute, Mihaly &Weinberger, Ellison Folk, October 27,2003.

Summary: Commenter urges Agency to reconsider the proposed amendments because "parks can often have significant environmental impacts, such as the construction of facilities and the introduction of people into a previously protected natural area."

Response: Agency believes no change to proposed section 15325 is warranted by the commenter's remarks. See Agency's response to Association of Environmental Professionals, Dwight Steinert, October 1, 2003, on this section.

SECTION 15330. Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances.

Section 15330

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003. Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the amendments to this section.

Response: Agency notes this support of the proposed amendment.

Section 15330(a)

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter notes that the proposed revision simplifies the Guideline. Commenter also notes that deleting language that makes the exemption currently available to one type of hazardous waste incinerator (all others are excluded), may create a negative effect on the operators of those types of waste incinerators, as the categorical exemption would no longer be available to them.

Response: Agency does not believe the commenter's remarks warrant a change to section 15330. Agency agrees that the proposed revision simplifies the guidelines and believes that it is appropriate to treat all hazardous waste incinerators in a consistent fashion. This amendment accomplishes that objective by eliminating the availability of the categorical exemption for "low temperature thermal desorption."

SECTION 15333. Small Habitat Restoration Projects.

Name/Date: Allison Anderson, October 27, 2003.

Summary: Commenter objects to the five acre size limitation asserting there "should not be a limit on restoration project size." Commenter states that "it does not make sense that there can be statements of overriding considerations on the one hand and then limits on sizes of restoration projects." Commenter believes that this section weakens CEQA.

Response. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. The proposed section does not create a limitation on the size of restoration projects; rather, it provides that those restoration projects not exceeding five acres may qualify for an exemption. The exemption should not raise the inference that restoration projects larger than five acres will have a significant effect on the environment. Restoration projects larger than five acres may qualify for a different categorical exemption.

Section 21084 of the Public Resources Code requires the Guidelines to include a list of classes of projects which have been determined not to have a significant effect on the environment. A Task Force to the Secretary for Resources studied restoration projects, and concluded that "while small scale restoration projects may involve short-term disturbance, their impacts are inherently mitigated below the threshold of significance because the project is designed precisely to make a transition to improved watershed or habitat conditions for conservation purposes." *Removing Barriers to Restoration Report of the Task Force to the Secretary for Resources*, pp. 10-11 (2002). The Task Force recommended an exemption for small (not exceeding five acres) projects in order to eliminate an economic disincentive for a private landowner to engage in small restoration projects. Agency disagrees that the proposed exemption weakens CEQA.

Name/Date: American Planning Association, California Chapter, Vince Bertoni, September 22, 2003.

Summary: Commenter proposes the following changes to the proposed amendment "to ensure that projects will usually not result in a significant effect and to remove redundancies" with section 15300.2:

~~(a) There would be no significant adverse impact on endangered, rare or threatened species or their habitat pursuant to section 15065,~~
~~(b) There are no hazardous materials at or around the project site that may be disturbed or removed, and~~
~~(c) The project will not result in impacts that are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of reasonably foreseeable future projects.~~
(1) the project will not result in discharge of fill in noncompliance with Section 404 of the Clean Water Act;
(2) the project will not result in the unauthorized take of a special status species listed under the California Endangered Species Act (citation) or federal Endangered Species Act (citation);
(3) the project includes best management practices for erosion control as may be established by the applicable Regional Water Quality Control Board;
(4) the planting palette will consist primarily of species native to the restoration area; and
(5) where an HCP or NCCP has been adopted, the project is consistent with the requirements of that plan.

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. While Agency acknowledges some overlap between subdivisions (a) through (c) and the exceptions to the use of exemptions in section 15300.2, and even other categorical exemptions, such as the class 4 exemption for minor alterations to land, one purpose of the proposed exemption is to encourage small restoration projects by addressing private landowners' fears associated with costs and risks. The provisos in subdivisions (a) through (c) educate such landowners as to the type of potential impacts that should be carefully considered when planning restoration activities, and preclude the use of the exemption where there could be significant adverse impacts on sensitive species, disturbance of hazardous materials, or significant cumulative impacts, but they are not meant to be exhaustive or mutually exclusive of other restrictions on the use of categorical exemptions. Therefore, the exceptions to the use of exemptions listed in Guidelines section 15300.2 still apply and prohibit use of an exemption for an activity where there is a reasonable possibility of a significant effect on the environment due to unusual circumstances. The proposed exemption is tailored to projects that will not have a significant effect on the environment due to the presence of sensitive environments, hazardous conditions, or potentially significant adverse physical impacts which are minor themselves but cumulatively significant.

Agency does not agree with commenter's proposed new language. Commenter's proposed new language in clauses (1) and (2) is unnecessary because the proposed exemption does not exempt a project from any existing regulatory requirement such as section 404 of the Clean Water Act or take prohibitions in the federal and State Endangered Species Acts. Agency does not agree that this categorical exemption should require projects subject to the exemption to use "best management practices" for erosion control, as proposed in commenter's clause (3). Agency does not think it is appropriate to incorporate what is generally an ongoing permit condition or a mitigation monitoring and reporting plan requirement into a class of activities subject to a categorical exemption. Moreover, commenter's proposed language in clause (4) related to conservation plans goes beyond the intent and scope of the proposed amendment. Agency does not believe that the use of non-native plants should automatically be an exception from the use of this categorical exemption. For example, there may be places where non-native plants can advance habitat protection, such as the use of non-invasive plants to stabilize soil upslope from aquatic habitats. Finally, a Habitat Conservation Plan (HCP) or Natural Communities Conservation Plan is a permitting vehicle which sets out required conservation measures to allow, in the course of an otherwise lawful activity, "incidental take" of threatened and endangered species under section 10 of the Federal Endangered Species Act and section 2835 of the Fish and Game Code, respectively. Agency does not think it is appropriate to incorporate these requirements in this categorical exemption. Therefore, Agency declines to adopt commenter's changes to the proposed amendment.

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter proposes several amendments to this section. Commenter recommends that the five acre maximum size limitation be revised to also include projects that span 2,000 feet in watercourse length. In addition, commenter suggests that amendments require projects that utilize this exemption to (1) "not have a substantial adverse effect on federally protected 'waters of the United States,' including wetlands as defined by section 404 of the Clean Water Act"; (2) include "appropriate best management practices;" (3) require planting palettes for revegetation to consist primarily of species native to the restoration area and exclude all species on the California Exotic Pest Plant Council List of Non-Native Plants; and (4) where an HCP or NCCP has been adopted, to be consistent with the requirements of that plan.

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's response to Allison Anderson's comments October 27, 2003 and Wildlands Inc.'s comment letter of October 6, 2003 (with respect to size of the project) and American Planning Association's comment letter of September 22, 2003 (with respect to the other suggestions) on this section. Commenter's proposal that the five acre maximum size limitation be revised to also include projects that span 2000 feet in watercourse length is beyond the scope of this rulemaking. Agency may consider this comment in connection with future rulemaking.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter supports the proposed exemption, reasoning that it is consistent with other CEQA provisions exempting projects that "result in environmental improvements from CEQA review under limited circumstances."

Response: Agency notes this support of the proposed exemption.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter supports the proposed exemption, describing it as "a welcome addition to the categorical exemptions." Commenter asserts, however that "the 5 acre limit…should be increased, since CEQA should not provide a disincentive for habitat restoration projects."

Response. Agency notes this support of the proposed exemption, but believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's response to Allison Anderson's comment letter of October 27, 2003 and Wildlands Inc.'s comment letter of October 6, 2003 with respect to the size of exempt projects.

Name/Date: California Association of Resource Conservation Districts, Nadine L. Scott, October 5, 2003.

Summary: Commenter supports the proposed exemption, asserting it will "assist landowners who wish to revegetate stream banks." Commenter states the 103 Resource Conservation Districts throughout the state will be able to "assist these landowners, perpetuating the common goal of improving habitat without having to comply with previous cost-prohibitive regulations."

Response: Agency notes this support of the proposed exemption.

Name/Date: California Department of Food and Agriculture, Steve Shaffer, October 29, 2003.

Summary: Commenter asserts that CEQA defines the conversion of agricultural land to non-agricultural use as a potentially significant environmental effect. Commenter states that conversion of agricultural land also occurs through restoration projects, and that this conversion is sometimes ignored through the use of the categorical exemptions. Commenter suggests revising the proposed exemption to require that there would be no significant adverse impacts on agricultural resources as determined by mandatory use of the Land Evaluation and Site Assessment (LESA) model. In addition, commenter proposes an additional example be added for "agricultural land improvements that improve the compatibility of wildlife habitat with agricultural operations and vice versa."

Response: Agency does not believe the commenter's remarks warrant a change to proposed section 15333. Please see Agency's response to the California Department of Food and Agriculture's October 29, 2003 comment letter in section 15313, above. Agency disagrees that under CEQA, potential economic impact to the agricultural industry is a category of "environmental impact," and thus any use of agricultural land for noncommercial purposes, such as restoration and preservation is a "potentially significant impact." As noted above, because an analysis of CEQA's applicability to agricultural land is outside the scope of the proposed amendments, Agency declines to make a detailed response to such comments.

Agency appreciates commenter's proposal of an additional example. Although the suggestion is beyond the scope of this rulemaking, Agency may consider this proposal in connection with future rulemakings.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, October 27, 2003.

Summary: Commenter "believes there may be circumstances where small projects that improve the environment may not have significant effects" but asserts that wetland creation projects should not be granted categorical

exemptions because, for example, in the Delta these projects can produce increased levels of methylmercury in the immediate environment.

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. Based on the research of a Task Force to the Secretary for Resources, the impacts of small scale restoration projects "are inherently mitigated below the threshold of significance because the project is designed precisely to make a transition to improved watershed or habitat conditions for conservation purposes." *Removing Barriers to Restoration Report of the Task Force to the Secretary for Resources*, pp. 10-11 (2002). If, due to unusual circumstances a wetland creation project could have a significant impact, the use of this exemption would be precluded by section 15300.2 of the Guidelines, which prohibits the use of an exemption for any activity where there is a "reasonable possibility" of a significant effect on the environment due to unusual circumstances. Moreover, Agency notes that by its terms, proposed section 15333 is not available if there are hazardous materials at or around the project site that could be disturbed or removed.

Name/Date: California Native Plant Society, Emily B. Roberson, October 24, 2003.

Summary: Commenter provides several reasons for its opposition to this section.

First, commenter expresses fears that despite the specific language of subdivision (c), this exemption will be used to impermissibly segment larger restoration projects into multiple 5-acre projects. Commenter reasons that lead agencies may not have access to sufficient information to implement subdivision (c).

Second, commenter states that the burden of compliance with subdivisions (a)-(c) rests on project proponents and that lead agencies are ill-prepared to determine if the representations of the project proponent will comply sufficiently with (a)-(c).

Third, commenter argues that native ecosystem restoration is rarely fully successful, and expresses fears that projects under this section may be used as parts of mitigation for projects with significant impacts.

Fourth, commenter asserts that the outcomes of restoration projects are not always predictable, reasoning that ecosystems "are complex and respond capriciously to manipulation. Some restoration projects," asserts commenter, "create more disturbance than restoration." For these reasons, commenter concludes that restoration projects "must be approached with as much caution as other project types."

Fifth, commenter notes that the exemption "relies on Section 15065 to ensure that there would be no significant adverse impacts to endangered, rare or threatened species." Reiterating its objection to the proposed amendments to section 15065, commenter argues that reliance on section 15065 "would significantly weaken its effectiveness in preventing significant impacts to imperiled species."

Finally, commenter asserts that the absence of any limitation other than acreage for the types of projects that would be covered by this exemption makes it inconsistent with the purpose of CEQA. Commenter recommends preparation of mitigated negative declarations for all restoration projects and full EIRs for any restoration project that "propose habitat type conversion (i.e. seasonal wetlands to perennial wetlands)."

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks.

Agency disagrees with commenter's statement that lead agencies will fail to comply with their obligations under CEQA, resulting in unlawful segmentation of projects and other abuses. Agency believes that lead agencies will comply with the law and discharge their obligations. In this regard, the Guidelines state that "[e]ach public agency is responsible for complying with CEQA and these Guidelines. A public agency must meet its own responsibilities under CEQA and shall not rely on comments from other public agencies or private citizens as a substitute for work CEQA requires the lead agency to accomplish. For example, a lead agency is responsible for the adequacy of its environmental documents." (CEQA Guidelines § 15020.) Therefore, Agency disagrees that the proposed exemption will result in increased impermissible segmentation or places the burden of compliance with subdivisions (a)-(c) on project proponents.

With respect to commenter's concern about the success of native ecosystem restoration, Agency understands there have been many successful examples of habitat restoration with native species; one common example is riparian willow plantings. Agency does not believe this concern casts doubt on the conclusion that this class of project does not have a significant effect on the environment. Restoration of native plants is just one example of a beneficial activity that could be exempt under the proposed amendment. Agency notes commenter's concerns about the success of restoration projects generally, but again does not believe this concern casts doubt on the conclusion that this class of project does not have a significant effect on the environment.

In response to commenter's concerns regarding the proposed amendments to section 15065, please see Agency's response to Ms. Allison Anderson's comments of October 27, 2003, above, and Agency's response to California Native Plant Society's comments on proposed section 15065 amendments, above. The purpose of the proposed exemption is to encourage a class of small

habitat restoration projects that will not cause any significant environmental effects. Subdivision (a) is meant to emphasize that the exemption is not to be used where there could be significant adverse impacts on sensitive species, but subdivisions (a) through (c) are not meant to be exhaustive or mutually exclusive of other restrictions on the use of categorical exemptions. Therefore, the exceptions to the use of exemptions listed in Guidelines section 15300.2 still apply and prohibit use of the exemption where there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.

Finally, as explained above, the exemption already incorporates limitations and exceptions other than acreage. Agency disagrees the exemption is inconsistent with the purposes of CEQA. Rather, this exemption complies with the requirement in section 21084 of the Public Resources Code, which requires the Guidelines to include a list of classes of projects which have been determined by the Secretary not to have a significant effect on the environment.

Name/Date: Defenders of Wildlife and Sierra Club, Kim Delfino, October 27, 2003**.**

Summary: Commenters do not object to a CEQA exemption for habitat restoration projects that protect and enhance fish and wildlife habitat." However, commenters state that they "cannot support this exemption if: (a) changes are not made to Guideline section 15065; (b) it is not clarified that such restoration projects are limited to projects that restore lost wetlands and do not result in the destruction of historic uplands; and (c) it is not clarified that such projects are conducted consistent with Fish and Game Code sections 1600, *et seq*."

Response: Agency believes no change to proposed section 15333 is warranted by commenter's remarks. With respect to commenters' concern about section 15065, see Agency's summary and response to the October 27, 2003 comments of Defenders of Wildlife and Sierra Club on section 15065, above. With respect to commenters' concerns regarding historic uplands, section 15300.2 prohibits use of the exemption for any activity where there is a "reasonable possibility" of a significant effect on the environment due to unusual circumstances. Finally, the proposed exemption does not exempt a project from any existing regulatory requirement such as the need for a streambed alteration agreement (Fish and Game Code § 1600, *et seq*.) or any requirement of the State or federal Endangered Species Acts. Therefore, Agency declines to adopt commenter's proposed modifications.

Name/Date: East Bay Regional Park District, Daniel Sykes, October 3, 2003.

Summary: The East Bay Regional Parks District supports the proposed exemption, stating "the changes to sections 15313, 15325, and 15333 are

particularly good additions, which we believe will benefit many public agencies like us, who protect and restore public lands."

Response: Agency notes this support of the proposed exemption.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters express general support of the proposed categorical exemption, but request that Agency add an additional subdivision that requires "any project that will divert, obstruct, or change the natural flow or the bed, channel, or bank of any river, stream, or lake shall be carried out in compliance with the conditions of approval issued by the California Department of Fish and Game pursuant to section 1600, *et seq*., of Chapter 6 of Division 2 of the Fish and Game Code."

Response: Agency believes no change to proposed section 15333 is warranted by the commenters' remarks. The proposed categorical exemption does not exempt a project from State requirements for streambed alteration agreements or water quality certification, nor from any other State or federal regulatory requirements.

Name/Date: Wildlands, Inc, Greg DeYoung, October 6, 2003.

Summary: Commenter supports the proposed exemption, but strongly recommends that the five-acre limitation be either increased or abandoned. Commenter states that in lieu of an acreage limitation, a performance standard should be adopted, making the exemption applicable to larger projects that do not raise any of the exceptions to the exemptions contained in CEQA Guideline section 15300.2. Alternatively, if the acreage limitation is retained, commenter asserts it should be clarified to apply only to the affected area and not the property as a whole.

Response. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's response to Allison Anderson's comment letter of October 27, 2003 on section 15333, above. Agency appreciates commenter's suggestion that the acreage limitation be replaced by a performance standard but declines to make this change, which is beyond the scope of this rulemaking. In addition, Agency believes it is clear that the five-acre limitation in the exemption applies only to the project area. The title of Class 33 refers to "small habitat restoration projects," and the acreage limitation by its terms applies to "projects" for maintenance, restoration, enhancement or protection of habitat. Nothing in the categorical exemption suggests that a landowner is precluded from undertaking a five-acre small habitat restoration project pursuant to this categorical exemption if the project is located on a larger

piece of property owned by the same landowner. Therefore, Agency does not anticipate misunderstandings about the applicability of the five-acre limitation.

Section 15333 (a)

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter suggests that subdivision (a) is unnecessary and should be deleted. Commenter reasons that existing law prohibits the use of categorical exemptions when there is a reasonable possibility of a significant environmental impact.

Response. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's responses to the September 22, 2003 comments of the California Chapter of the American Planning Association on section 15333, above.

Section 15333(b)

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter suggests without explanation that subdivision (b) should be deleted.

Response. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's response to the September 22, 2003 comments of the California Chapter of the American Planning Association on section 15333, above.

Section 15333(c)

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter suggests without explanation that subdivision (c) should be removed.

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's response to the September 22, 2003 comments of the California Chapter of the American Planning Association on section 15333, above.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that subdivision (c) is unnecessary, because existing law prohibits the use of a categorical exemption if a project would result in cumulatively significant impacts. "If this redundant text is retained," asserts the commenter, "we suggest the following revision to the language you have proposed: The project will not result in impacts that are *cumulatively* significant. ~~when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of reasonably foreseeable future projects.~~"

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's response to the September 22, 2003 comments of the California Chapter of the American Planning Association on subdivision 15333, above. Agency does not agree with commenter's proposed change, because it would introduce a new concept, "cumulatively significant" into the Guidelines, which is not defined. See Agency's response to comments of The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003, on section 15064.

Name/Date: Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that subdivision (c) should read "probable future projects" rather than "reasonably foreseeable future projects," to be consistent with Guideline section 15130.

Response: Agency has withdrawn the proposed changes to section 15130, which would have referred to "reasonably foreseeable future projects." In amendments proposed pursuant to Government Code section 11346.8(c), Agency has modified the proposed language consistent with this comment.

Section 15333(d)

Name/Date: Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenter suggests that subdivision (d)(3) should read "improve habitat for native fish or wildlife" rather than "improve habitat for amphibians or native fish." Commenter also proposes nonsubstantive changes to subdivision (d)(4) to replace "and not" with "rather than with" so the project example would read: "projects to restore or enhance habitat that are carried out principally with hand labor rather than with mechanized equipment." Commenter also recommends changing subdivision (d)(6) to read "the primary purpose of which is to improve habitat" rather than "the primary purpose of which is to improve habitat or reduce sedimentation."

Response. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. While subdivision (d) provides illustrative examples of projects that may be exempt under the proposed amendment, it is

not an exclusive list. Nor are categorical exemptions mutually exclusive. Subdivision (d) is intended to provide examples of, but not limit, a range of activities that may be exempt under the proposed amendment. Thus, Agency does not believe the suggested changes to subdivisions (d)(3) and (d)(4) are necessary. Agency recognizes that a wide range of activities and project designs may be used to restore, enhance or protect habitat. These include activities, such as erosion control, weed removal and riparian plantings, which may extend a significant distance along the bank. With respect to erosion control stewardship activities, the Task Force to the Secretary for Resources identified this as critical to advancing State habitat protection and restoration goals, which could be readily increased if risks and costs were reduced. (*Removing Barriers to Restoration Report of the Task Force to the Secretary for Resources* (2002).) Therefore Agency believes it is important to retain the proposed language in section 15333 (d)(6).

Name/Date: California Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter recommends adding to the end of subdivision (d)(6) "provided that the water quantity and quality leaving the site does not change the inflow to any state highway drainage facilities." Commenter also notes that "National Marine Fishery Service" is now "NOAA Fisheries."

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. The inclusion of Department of Fish and Game and NOAA guidelines in the example addresses the commenter's concerns regarding water leaving the site. Moreover, this exemption will not excuse compliance with other existing laws such as the Clean Water Act and Fish and Game Code sections 1600 *et seq*. In amendments proposed pursuant to Government Code section 11346.8(c), Agency has modified subdivision (d)(6) to reflect the name change from "National Marine Fisheries Service" to "NOAA Fisheries."

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter proposes three changes to subdivision (d). First, commenter recommends amending subdivision (d)(4) as follows: projects to restore or enhance habitat that ~~are carried out principally with hand labor and not mechanized equipment~~ *involve minor alterations in land, water, and vegetation*. Commenter states that "some dependence on mechanized equipment, for such activities as minor trenching, maintenance dredging, and minor grading, is permissible based on another categorical exemption, Class 4, section 15304 of the State CEQA Guidelines." Second, commenter proposes adding an additional example within subdivision (d) for "projects that involve removal of non-native vegetation or invasive vegetation." Finally commenter proposes an additional

example within subdivision (d) for "activities that involve the removal of accumulated sediment within water distribution/transmission facilities that hinders vegetation removal of non-native or invasive vegetation."

Response: Commenter's proposed changes to section 15333 are beyond the scope of this rulemaking. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's responses to the October 27, 2003 comments of Southern California Steelhead Coalition, the October 27, 2003 comments of Sustainable Conservation, and the October 6, 2003 comments of Wildlands, Inc. on this section. Agency may consider these remarks in connection with future rulemakings.

Name/Date: Planning and Conservation League Foundation, public testimony of Mary Akens, September 30, 2003.

Summary: Commenter states that it is not opposed to the proposed exemption but suggests subdivision (d)(6) should be removed because wetland and stream areas are environmentally sensitive and culvert removal could add sedimentation and cause other impacts. "At the very least," states the commenter, "a mitigated negative declaration would ensure removal be conducted during a more proper time of year, a proper season, maybe a drier season, and make sure that any other necessary mitigation measures are in store or are in place for any type of other impact that may be associated with culvert replacement."

Response: Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. The proposed section does not exempt a project from any legal requirement other than CEQA. Thus, culvert replacement projects carried out to remove fish passage barriers or improve habitat must comply with the requirements of Fish and Game Code section 1600, *et seq*., and any other applicable state or federal regulatory requirement. Agency believes that in light of the requirement of compliance with the "published guidelines of the Department of Fish and Game or NOAA Fisheries," the projects covered by this exemption will not have a significant effect on the environment

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenter requests that subdivision (d)(6) be revised to require all culvert replacements be made subject to compliance with an agreement with the California Department of Fish and Game pursuant to section 1600, *et seq*., of the Fish and Game Code.

Response: Agency believes no change to proposed section 15333 is warranted by the commenters' remarks. The proposed section does not exempt a project from any legal requirement other than CEQA. Subdivision (d)(6) is one example of the kinds of projects Agency expects may use this new CEQA exemption.

Culvert replacement projects must still comply with the requirements of Fish and Game Code section 1600, *et seq*., and any other applicable state or federal regulatory requirement.

Name/Date: Southern California Steelhead Coalition, David Pritchett, October 27, 2003.

Summary: Commenter urges amendment of subdivision (d)(6) to include projects to retrofit instream road crossings and other small fish passage barriers. According to commenter, "culverts are not the only type of fish passage barrier that should be included in this example" because "instream road crossings (also commonly called Arizona crossings or fords) are the majority type of all fish passage barriers in southern California and many Central Coast regions…"

Response: Agency does not believe that commenter's remarks warrant a change to proposed section 15333. Agency recognizes the importance of projects to retrofit instream road crossings and other small fish passage barriers. Subdivision (d) provides a list of examples of activities that may be included in the exemption, but it is not an exclusive list. The exemption includes other activities that are consistent with section 15333 and subdivisions (a), (b) and (c).

Name/Date: Sustainable Conservation, Bob Neale, October 27. 2003.

Summary: Commenter expresses strong support for this section, concluding that "the proposed amendments in 15065 and 15333 will greatly increase the amount of high quality voluntary conservation on private lands while continuing to ensure that the spirit and letter of CEQA is met." However, commenter recommends deletion of subdivision (d)(4). Commenter states that subdivision (d)(4) could be seen as conflicting with the examples in subdivisions (d)(2), (d)(5), and (d)(6). Commenter asserts that mechanized equipment is frequently necessary and appropriate to use in many small restoration projects.

Response: Agency notes this support of the proposed exemption, but believes no change to proposed section 15333 is warranted by the commenter's remarks. The proposed exemption includes activities that are consistent with section 15333 and subdivisions (a), (b) and (c). Subdivision (d) provides a list of examples of activities that may be included in the exemption, but it is not an exclusive list, nor does the list imply that other exempt activities must have some or all of the elements of the listed examples. The concept of conflicts among the examples is therefore not applicable, and Agency does not believe that the commenter's proposed changes are necessary.

Name/Date: Wildlands, Inc., Greg DeYoung, October 6, 2003.

Summary: Commenter suggests subdivision (d)(4) should be either eliminated or clarified. Commenter acknowledges that subdivision (d)(4) "is meant to be

illustrative rather than statutorial" [*sic*] but expresses concern "that it might raise a misunderstanding that only habitat restoration involving hand labor would qualify for exemption."

Response. Agency believes no change to proposed section 15333 is warranted by the commenter's remarks. See Agency's responses to the October 27, 2003 comments of Southern California Steelhead Coalition and Sustainable Conservation on this section. Subdivision (d) provides a list of examples of activities that may be included in the exemption, but it is not an exclusive list, nor does the list imply that other exempt activities must have some or all of the elements of the listed examples. Therefore, Agency declines to adopt commenter's proposed changes to the revision.

SECTION 15355. Cumulative Impacts

Name/ Date: The Metropolitan Water District of Southern California, Laura J. Simonek, October 16, 2003.

Summary: Commenter suggests deletion of the words "are considerable or which" in the first sentence of the regulation, and the addition of the word "Significant" to the beginning of the last sentence of subsection (b) of the regulation, to clarify the definition of "cumulative impacts."

Response: Changes in this section were not proposed as part of the original amendments, and therefore commenter's suggestions are beyond the scope of this rulemaking. Agency may consider this proposal in connection with future rulemakings.

SECTION 15378. Definition of Project.

Name/Date: Thomas Adams, October 7, 2003.

Summary: Commenter notes that there may be a grammatical error in subdivision (b)(5), and suggests replacing the proposed "will not result in direct or indirect physical changes" with "will not result, directly or indirectly, in a physical change."

Response: Agency does not believe that commenter's remarks warrant a change to section 15378. The proposed amendment is more consistent with CEQA and other existing Guideline sections than the language suggested by commenter. The definition of "project" in Public Resources Code section 21065 uses the terms "direct physical change" and "indirect physical change," and the terms are expressly defined in subdivision (d) of Guideline section 15064. The

terms are also used in subdivision (a) of this section. Therefore Agency declines to make the suggested change.

Name/Date: Bay Area Council, October 27, 2003.

Summary: Commenter notes that the proposed amendment of subdivision (b)(3) reflects the California Supreme Court's decision in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal. 4th 165. Commenter also notes that the proposed addition of subdivision (b)(5) "reflects settled law." Commenter supports the proposed amendments and states that the revision "appears to implement existing decisional law, but suggests "that it may be useful to clarify what 'public agency sponsored' means, if possible."

Response: Agency notes this support of the proposed amendment. Agency does not anticipate any confusion about whether an initiative is sponsored by citizens or a public agency. Any questions on this point should be resolved by the cases cited in subdivision (b)(3) as authority for this section.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003.

Summary: Commenter states that the amendment of subdivision (b)(3) "is a helpful clarification."

Response: Agency notes this support of the proposed amendment.

Name/Date: Susan Brandt-Hawley, October 27, 2003.

Summary: Commenter asserts that the amendment of subdivision (b)(3) "would be clearer if it stated "The submittal of citizen-sponsored proposals to a vote of the people of the state or of a particular community."

Response: Agency agrees that the suggested language accurately states the law, but believes the proposed amendment more clearly expresses the holding in *Sierra Madre* by explicitly excluding public agency sponsored initiatives, and therefore declines the suggested change. See Agency's response to Bay Area Council, October 27, 2003.

Name/Date: California Department of Transportation, Gary R. Winters, October 27, 2003.

Summary: Commenter suggests that examples of activities that are covered by subdivision (b)(5) would be helpful.

Response: Agency agrees that development of a list of examples may be helpful, but this suggestion is beyond the scope of this rulemaking. Agency may consider this proposal in connection with future rulemakings.

Name/Date: San Francisco Bay Area Rapid Transit District, Thomas E. Margro, October 3, 2003.

Summary: Commenter expresses concern that the amendment of subdivision (b)(3) could be read to extend beyond the Court's holding in *Sierra Madre*. Commenter notes that nothing in *Sierra Madre* holds that voter approval would convert agency proposals that are not "projects" under CEQA into projects requiring CEQA review. Commenter is concerned that the proposed amendment to (b)(3) could be read as requiring CEQA review of the submittal of any agency-sponsored initiative to the voters. According to commenter, "such an interpretation would expand the statute's coverage beyond the scope intended by the Legislature, requiring CEQA review for agency-sponsored ballot measures which could not reasonably be considered projects under the definition in CEQA…" and such a "result was not contemplated by *Sierra Madre*." Commenter acknowledges that "staff may have intended to limit the effect of the amendment to actions that are projects" under CEQA, but asserts that such an intention is not clear and the amendment "may be vulnerable to conflicting interpretations." Commenter suggests replacing the proposed language with "provided such submittal is not a proposal initiated by a public agency which would be considered a project under section 15378(a) if adopted by the agency."

Response: Agency believes no change is warranted by the commenter's remarks. Subdivision (b) of this section lists examples of activities that are not projects. The proposed amendment adds qualifying language to an existing example in order to clarify that, consistent with the California Supreme Court's decision in *Sierra Madre*, this example of activities that are not projects does not apply to a public agency-sponsored initiative. In other words, a public-agency sponsored initiative could be a project if it otherwise met the definition of "project" for purposes of CEQA. This amendment does not require environmental review of public agency-sponsored ballot measures that are not otherwise projects for purposes of CEQA. Agency agrees that such an interpretation would exceed the scope of the statutory definition of project. Agency believes that the intent of the proposed amendment is clear, and that the amendment is not susceptible to the expansive interpretation suggested by commenter.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003. Association of Environmental Professionals, Dwight Steinert, October 1, 2003.

Summary: Commenters express support of the proposed amendments.

Response: Agency notes this support of the proposed amendment.

APPENDIX C.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed revisions to Appendix C, but requests that the California Department of Fish and Game (headquarters office) be added to the Reviewing Agencies Checklist on page two of the Notice of Completion.

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. The headquarters office of the California Department of Fish and Game is already an option on the Reviewing Agencies Checklist. A separate line is provided for identification of the regional office, where appropriate, in addition to the headquarters office of the Department of Fish and Game.

Name/Date: Solano County, James Laughlin, October 27, 2003.

Summary: Commenter welcomes the addition of Appendix L. However, commenter notes that Appendix C and L are both called Notices of Completion, which creates confusion. Commenter suggests that Appendix C retain of the title "Notice of Completion" but that Appendix L be given a unique name, such as "Notice of Availability."

Response: Agency does not believe the names of Appendix C and Appendix L will cause confusion, but may consider further amendments if confusion results. The name of Appendix C is clearly printed at the top of the form ("Notice of Completion and Environmental Document Transmittal") with the State Clearinghouse mailing address. This title and address clearly identifies it as a form to be used when sending documents to the State Clearinghouse. The title of Appendix C adequately distinguishes it from the notice in Appendix L, which is named "Notice of Completion of a Draft EIR."

APPENDIX D.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed revision to Appendix D.

Response: Agency notes this support of the proposed amendment.

APPENDIX L.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Summary: Commenters support the proposed addition of Appendix L.

Response: Agency notes this support of the proposed amendment.

Name/Date: Solano County, James Laughlin, October 27, 2003.

Summary: Commenter suggests that Appendix L be renamed "Notice of Availability" in order to distinguish it from Appendix C.

Response: Agency does not believe that commenter's remarks warrant a change to Appendix L. See Agency's response to October 27, 2003 comments of Solano County on Appendix C.

Summaries and Responses to Public Comments Received on Amendments Proposed May 25, 2004
(sorted numerically by proposed guidelines changes)

General Comments

Agency made available additional revisions to the proposed amendments to the CEQA Guidelines pursuant to section 11346.8 of the Government Code on May 25, 2004. Comment period for these additional revisions closed on June 11, 2004. Agency received a small number of comments in response to these changes to the proposed amendments. Many of the commenters made comments on the portions of the proposed amendments that Agency did not propose to change in the additional revisions. Since the comment period on those proposed amendments closed on October 27, 2003, Agency did not make a detailed response to such comments. Agency also received comments urging Agency to make changes in addition to those proposed in these additional revisions. Again, Agency did not make a detailed response to such comments, which are not relevant to the proposed rulemaking.

Agency received one general comment stating that the 15-day review period did not provide adequate time to respond to the new revisions. See League of California Cities, Daniel Carrigg, June 11, 2004. Agency provided the amount of time required under section 11346.8 of the Government Code. Moreover, Agency believes all parties have had ample opportunity to comment on these regulations, including the fairly minor changes to the original regulations, proposed in the most recent 15-day review period.

SECTION 15023. Office of Planning and Research (OPR).

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support this proposed amendment.

Response: Agency notes this support of the proposed amendment.

SECTION 15041. Authority to Mitigate.

Name/Date: Beveridge and Diamond, P.C., Jennifer Hernandez, June 11, 2004. California Farm Bureau Federation, Rebecca Sheehan, June 9, 2004.

Summary: Commenters support withdrawal of the proposed amendments.

Response: Agency notes this support of withdrawal of the proposed amendments.

Name/Date: Planning and Conservation League Foundation, Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters state that Agency should reconsider its withdrawal of the proposed amendments to section 15041. Commenters state that the second sentence of the proposed guidelines should be eliminated to reflect this section's preamble.

Response: Agency has withdrawn these proposed amendments and does not intend to reinstate them.

SECTION 15062. Notice of Exemption.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: Commenters raise several concerns about the changes to section 15062(a)(2). Commenters object to the use of the phrase "specific

map," stating that it is inconsistent with section 15124 which uses the phrase "detailed map." Commenters state that the identification of the type of map in section 15062(a)(2) adds complexity and the requirement is more detailed than that of section 15124. Commenters also believe that the type of map indicated is typically outdated for most areas of California and commenters recommend that the section should be modified to use existing language.

Response: These comments do not relate to the new language proposed by Agency on May 25, 2004. Therefore, they are outside the scope of the amendments proposed pursuant to section 11346.8(c) of the Government Code and do not warrant a detailed response. In any event, Agency does not believe commenter's remarks warrant changes to proposed section 15062. Agency is proposing to amend the Guidelines to ensure that the term "specific map" is used consistently in sections 15062, 15082, 15085, and 15094. Section 15124 identifies the contents of an Environmental Impact Report (EIR). The level of detail required for an EIR project description is far greater than that required in a public notice. See Agency's response to the October 27, 2003 comments of Best, Best & Krieger LLP. Agency does not consider the project location requirements of section 15124(a) to be appropriate in notices under sections 15062, 15075, 15082, 15085 and 15094. See Agency's response to comments from the County Sanitation Districts of Los Angeles County, dated October 23, 2003, regarding section 15085(a).

Name/Date: County Sanitation Districts of Los Angeles County, John D. Kilgore, June 9, 2004.

Summary: Commenter restates the same issues as those raised in its October 23, 2003 comments on initially proposed amendments to section 15062.

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to commenter's remarks on initially proposed amendments to section 15062.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters restate the same issues as those raised in their October 27, 2003 comments on initially proposed amendments to section 15062.

Response: The Agency believes no changes to the proposed amendments are warranted by commenters' remarks. See Agency's response to commenters' remarks on initially proposed amendments to section 15062.

Name/Date: Best, Best & Krieger LLP, Jennifer T. Buckman, June 11, 2004.

Summary: Commenter states that the proposed changes to this section regarding the requirements for describing the location of the project in subdivision (a)(2) of this section should be consistent with the language in 15082(a)(1)(B), 15085(b)(2), and 15094(b)(1).

Response: In amendments proposed pursuant to Government Code section 11346.8(c), Agency amended sections 15082(a)(1)(B), 15094(b)(1) and 15085(b)(2) to make project location description requirements consistent with section 15062(a)(2).

SECTION 15063. Initial Study

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters generally support the amendments originally proposed by Agency. Commenters also reiterate statements made in their October 27, 2003 remarks on the initially proposed language for this section.

Response: Agency has withdrawn all proposed amendments to this section and does not intend to reinstate those amendments.

SECTION 15064. Determining the Significance of the Environmental Effects Caused by a Project.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, June 11, 2004.

Comment: Commenters support the revisions to this section. Commenters also recommend that the phrase “substantially lessen” in the first sentence of subdivision (h)(3) be changed to “clearly avoid or mitigate to less than significant levels.”

Response: This comment does not relate to the originally proposed amendment or to the language proposed by Agency on May 25, 2004. Therefore, the comment is beyond the scope of this rulemaking and the amendments proposed pursuant to section 11346.8(c) of the Government Code and does not warrant a response. In any event, Agency does not believe commenters’ remarks warrant changes to the proposed amendments.

SECTION 15064.5. Determining the Significance of Impacts on Historical and Unique Archeological Resources.

Name/Date: Senator John Burton, California State Senate, June 7, 2004.

Summary: Commenter states that Agency should reconsider the withdrawal of proposed curation language from section 15064.5. Commenter states that artifacts that arise from project testing are important to curate because they can become teaching collections, parts of exhibits, and may later be found to have significance as technologies evolve.

Response: Agency appreciates commenter's remarks. Agency has emphasized that curation may be an appropriate mitigation measure for consideration by a lead agency by retaining the proposed curation amendment in section 15126.4, which specifically addresses the development of appropriate mitigation measures. Comments on the amendments proposed by Agency in August 2003 pointed out that the placement of the identical curation language in section 15064.5 was erroneous and confusing, since section 15064.5 relates to the determination of the significance of the environmental effects of a project, not to appropriate mitigation measures. Section 15064.5 is used by lead agencies to assess whether there is the potential for a proposed project to adversely affect an historical or a unique archeological resource. This determination would be done at the point in time when a lead agency would be trying to determine whether a project requires an EIR or whether a negative declaration would be sufficient, or during the preparation of the EIR while assessing potential significance. Removing the curation language from section 15064.5, but retaining it in section 15126.4 will not detract from Agency's emphasizing the potential for using curation as a mitigation measure, because once a potential impact has been determined, the lead agency (or the preparer of the document) would turn to section 15126.4, to consider appropriate mitigation measures. Therefore, curation will now be noted as a potentially appropriate mitigation measure.

Name/Date: San Diego Archeological Center, Courtney Ann Coyle, June 10, 2004.

Summary: Commenter requests that Agency reconsider the withdrawal of the previously proposed curation language in section 15064.5. Commenter asserts that artifacts arise not just during the data recovery phase but also earlier in the development process during test excavations, and that these artifacts and records from test excavations are often the only record of information from a site after the site is impacted by construction.

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to Senator John Burton, California State Senate, June 7, 2004. In suggesting that lead agencies

may consider curation as an appropriate mitigation measure during project excavation or testing, section 15126.4 does not preclude lead agencies from considering curation as mitigation for work conducted as part of test excavations, to the extent such work was part of the project subject to CEQA review.

Name/Date: Bruce G. Gallagher, June 10, 2004.

Summary: Commenter requests that the withdrawn proposed amendment regarding curation be reinstated. Commenter states that "[e]ach recovered artifact is a small piece of the puzzle and what may not immediately appear important may become so in the future."

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's responses to the June 7, 2004 comments on this section from Senator John Burton, and the June 10, 2004 comments from the San Diego Archeological Center.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Comment: Commenters state that their questions and concerns have been answered or resolved. Commenters would not object to reinstatement of the initially proposed amendment to this section.

Response: For the reasons stated above in Agency's response to Senator John Burton, California State Senate, June 7, 2004, Agency does not intend to reinstate the initially proposed amendment to section 15064.5.

SECTION 15065. Mandatory Findings of Significance.

Name/Date: Endangered Habitats League, Dan Silver, June 7, 2004.

Summary: Commenter strongly opposes addition of the word "substantially" in proposed section 15065. Commenter contends the word is "vague and subjective." Commenter also contends because endangered, rare or threatened species "are already at the point of depletion . . . *any* reduction of numbers or restriction of range is significant" and an EIR should be required. (Italics in original.) Finally, the commenter objects to language in the proposed amendment regarding approved HCPs as improper deferral to the federal permitting process and "outside the purview" of the Department of Fish and Game.

Response: These comments are on portions of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to

these comments is not warranted. Moreover, the Agency believes no change to proposed section 15065 is warranted by the commenter's remarks. Agency disagrees the word "substantially" is vague and uncertain, and that the CEQA Guidelines should compel preparation of an EIR whenever a proposed project has the potential to reduce the number or restrict the range of an endangered, rare or threatened species. For additional detail, please see Agency's responses to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003; the State of California Department of Transportation dated October 27, 2003; the Natural Resources Defense Council dated October 27, 2003; and Shute, Mihaly & Weinberger dated October 27, 2003; Agency's response to comments regarding proposed section 15065(a) by the California Native Plant Society dated October 24, 2003; and Agency's responses to comments regarding proposed section 15065(a)(1) by the Environmental Defense Center dated October 6, 2003; the Defenders of Wildlife and Sierra Club dated October 27, 2003; the Planning and Conservation League Foundation and Defenders of Wildlife dated October 27, 2003; and the Planning and Conservation League Foundation dated September 30, 2003.

Agency also disagrees the phrase "pursuant to an approved" HCP in proposed section 15065(b)(2)(A) constitutes improper deferral to a federal permitting process that is outside the purview of the Department of Fish and Game. Proposed section 15065(b) provides an exception to the mandatory findings of significance in certain limited circumstances. While proposed section 15065(a) compels preparation of an EIR in certain circumstances, proposed section 15065(b) recognizes that mandatory findings of significance may not be required where the potential for significant impacts on endangered, rare or threatened species is avoided or mitigated to below a level of significance. Lead agencies should be able to consider and rely on mitigation measures set forth in an HCP approved by the federal government under the federal Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.). This is not improper deferral to a federal permitting process. It is appropriate consideration of substantial evidence relevant to whether the potential for significant impacts on endangered, rare or threatened species can be avoided or mitigated to a point where clearly no significant impact would occur.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters "incorporate as though fully set forth" in their letter, "the comments of Dan Silver, Endangered Habitats League[.]"

Response: Agency believes no change to proposed section 15065 is warranted by the commenters' remark. For additional detail, please see Agency's response to comments regarding proposed section 15065 by the Endangered Habitats League dated June 7, 2004.

Section 15065(a)

Name/Date: County Sanitation Districts of Los Angeles County, John D. Kilgore, June 9, 2004.

Summary: Commenter restates the same issues as those raised in its October 23, 2003 comments on initially proposed amendments to section 15065(a).

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to commenter's remarks on initially proposed amendments to section 15065(a).

Section 15065(a)(1)

Name/Date: Shute, Mihaly & Weinberger LLP, Jenny K. Harbine, June 11, 2004.

Summary: Commenter objects to proposed section 15065 as unlawful. Specifically, the commenter contends addition of the word "substantially" in proposed section 15065(a)(1) is "outside the scope of the Resources Agency's authority" because the proposed amendment would alter or amend the governing statute in contravention of section 11342.2 of the Government Code. Likewise, the commenter contends proposed section 15065(a)(1) is unlawful because "it is contrary to well-established CEQA case law[.]" Finally, the commenter contends "[r]aising the significance threshold to require a 'substantial' reduction . . . violates both the letter and spirit" of the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.).

Response: These comments are on portions of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to these comments is not warranted. Moreover, Agency believes no change to proposed section 15065(a)(1) is warranted by the commenter's remarks. In essence, the commenter contends Agency has no authority to interpret the "curtail the range of the environment" language in section 21083, subdivision (b)(1), to encompass, among other things, projects with the potential to substantially reduce the number or restrict the range of endangered, rare or threatened species. Agency disagrees. See Agency's response to comments regarding proposed section 15065 by Alison Anderson dated October 27, 2003.

Agency also disagrees with the commenter that proposed section 15065(a)(1) is unlawful because "it is contrary to well-established CEQA case law[.]" (Citing *Mountain Lion Foundation v. Fish and Game Comm.* (1997) 16 Cal.4th 105; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342; *San Bernardino Valley Audubon Society v. Metropolitan*

Water Dist. (1999) 71 Cal.App.4th 382.) Commenter's reliance on the cited case law is misplaced. See Agency's response to the comments of Alison Anderson on the initially proposed language, dated October 27, 2003.

With respect to commenters contention that "[r]aising the significance threshold to require a 'substantial' reduction . . . violates both the letter and spirit" of CESA, see Agency's response to the October 27, 2003 comments of Defenders of Wildlife and Sierra Club on the initially proposed language for section 15065(a)(1).

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters restate the same issues as those raised in its October 27, 2003 comments on initially proposed amendments to section 15065(a)(1).

Response: The Agency believes no changes to the proposed amendments are warranted by commenters' remarks. See Agency's response to commenter's remarks on initially proposed amendments to section 15065(a)(1).

Section 15065(a)(3)

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, June 9, 2004. Regional Council of Rural Counties, Mary Pitto, June 3, 2004.

Summary: Commenters note that the definition of probable future projects (section 15130) has been withdrawn from the proposal, but the section number is still referenced in section 15065(a)(3). Commenters recommend deletion of the phrase "as defined in Section 15130" from the end of section 15065(a)(3).

Response: Agency agrees with this suggestion and has deleted the phrase "as defined in Section 15130" from the end of section 15065(a)(3).

Section 15065(b)

Name/Date: County Sanitation Districts of Los Angeles County, John D. Kilgore, June 9, 2004.

Summary: Commenter restates the same issues as those raised in its October 23, 2003 comments on initially proposed amendments to section 15065(b).

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to commenter's remarks on initially proposed amendments to section 15065(b).

Name/Date: Shute, Mihaly & Weinberger LLP, Jenny K. Harbine, June 11, 2004.

Summary: Commenter contends proposed section 15065(b) is "beyond the scope of the Resources Agency's authority because it is contrary to the very purpose of [the] mandatory findings of significance pursuant to Public Resources Code section 21083(b)." To support its contention, the commenter cites various provisions of CEQA articulating the standard governing preparation of an EIR. Commenter then states, the proposed amendment "would allow agencies to discharge their obligation to prepare an EIR, even when required by law to find certain of a project's effects significant, by adopting mitigation rather than actually preparing an EIR."

Response: These comments are on portions of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to these comments is not warranted. Moreover, Agency believes no change to proposed section 15065(b) is warranted by the commenter's remarks. Proposed section 15065(a) includes the finding required by Public Resources Code section 21083, subdivision (b)(1). The proposed amendment, in this respect, fully complies with the Legislature's direction to Agency regarding the mandatory findings of significance. See Agency's response to Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003.

Second, proposed section 15065(b) is not inconsistent with established standards governing required preparation of EIRs. Agency agrees, where substantial evidence in light of the whole record supports a fair argument that a proposed project may result in a significant effect on the environment, an EIR must be prepared under CEQA. (See, e.g., Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d).) Proposed section 15065(b) does not run afoul of these standards. The proposed amendment provides, for example, that a lead agency need not prepare an EIR solely because of the potential for a significant effect where project modifications or mitigation measures would avoid or mitigate the potential for a significant impact under proposed section 15065(a) to a point where clearly no significant impact would occur. The proposed amendment, in this sense, is entirely consistent with existing law governing mitigated negative declarations. (*Id.*, § 21080, subd. (c)(2).) Agency, in this respect, disagrees with the commenter's remarks to the contrary.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters restate the same issues as those raised in their October 27, 2003 comments on initially proposed amendments to section 15065(b).

Response: The Agency believes no changes to the proposed amendments are warranted by commenters' remarks. See Agency's response to commenters' remarks on initially proposed amendments to section 15065(b).

Section 15065(b)(1)

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters refer to proposed section 15065(b)(1) and ask, "What is the definition of 'preliminary review'?"

Response: This comment is on a portion of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to these comments is not warranted. Moreover, Agency believes no change to proposed section 15065(b)(1) is warranted by the commenters' remark. See Agency's response to American Planning Association, California Chapter, Vince Bertoni, September 22, 2003 on 15065(b)(1) and County Sanitation Districts of Los Angeles County, Felicia Ursitti, October 23, 2003 on 15065(b).

Section 15065(b)(2)

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: Commenters are concerned with language in proposed section 15065(b)(2)(A) regarding project proponents being "bound to implement mitigation requirements . . . pursuant to an approved habitat conservation plan [HCP] or natural community conservation plan [NCCP]." Commenters' concern is that, "in the typical case, it is the sponsoring local agency, not the project proponent, that enters into the Implementing Agreement with the state or federal agency." According to the commenters, "even when the project proponent performs in accordance with those conditions place[d] on the proponent by a local agency pursuant to the Implementation Agreement[,]" a court may not consider the project proponent to be "bound to implement the mitigation requirements" as set forth in proposed section 15065(b)(2)(A). Commenters

recommend, as a result, that proposed section 15065(b)(2)(A) be revised to speak in terms of project proponents agreeing to "comply with applicable requirements[.]"

Commenters also object to proposed section 15065(b)(2)(A) and (B) as too limited. In the commenters' view, proposed section 15065(b)(2)(A) should be expanded beyond HCPs and NCCPs to include other methods of mitigation, including incidental take permits under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), "candidate conservation agreements" under the federal Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.), and other "biological resource protection plans" authorized under State and federal law. Similarly, the commenters contend proposed section 15065(b)(2)(B) should not be limited to EIRs and EIS's. Commenters believe the latter section should extend to negative declarations under CEQA or a "finding of no significant impact" (FONSI) under the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.). Indeed, the commenters recommend Agency change the proposed amendment to condition the approval of any biological resource protection plan only upon "a process requiring notice to the public and an opportunity for public comment."

Absent the changes highlighted in the preceding paragraph, the commenters assert proposed section 15065 "will be read to require EIRs whenever HCPs or NCCPs are not used to mitigate impacts to species." Likewise, the commenters suggest there is "no need for Subsection (b)(2) at all." According to the commenters, "if an EIR or EIS has already been prepared and the species-related impacts of a project [are] mitigated, the project proponent will *always* have the ability to rely upon a negative declaration with respect to species-related impacts, *regardless* of whether the other criteria in Subsection (b)(2) are satisfied." (Italics in original.)

Finally, the commenters recommend deleting proposed section 15065(b)(2)(C). In their view, the standards articulated in the proposed amendment are "dramatically more stringent" than the permitting standards established by ESA or the NCCPA. In the commenters' view, "[i]f an HCP satisfies the requirements of [ESA] or the [NCCPA], that should be more than sufficient."

Response: These comments are on a portion of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to these comments is not warranted. Moreover, Agency believes no change to proposed section 15065(b)(2) is warranted by the commenters' remarks. As regards the commenters' initial remarks regarding proposed section 15065(b)(2)(A), Agency recognizes that sponsoring local agencies are often the permittees and signatories to . and/or Natural Community Conservation Planning Act (NCCPA) (Fish & G. Code, § 2800 et seq.). Implementation Agreements (IA) under the ESA and/or Natural Community Conservation

Planning Act (NCCPA) (Fish & G. Code, § 2800 et seq.). However, a project proponent can be "bound" as contemplated by proposed section 15065(b)(2)(A) even if the proponent is not itself a permit holder or signatory to an IA under ESA or the NCCPA. For example, in regional mitigation projects, a project proponent may be bound by local ordinances or local requirements for authorization of a particular project. In addition, a project proponent may agree in the context of a proposed mitigated negative declaration to implement certain mitigation requirements in an approved HCP or NCCP. Where the local lead agency, in turn, adopts the mitigated negative declaration and obligates the proponent to carry out those measures as a condition of project approval, Agency believes the proponent would be "bound to implement mitigation requirements" as contemplated by proposed section 15065(b)(2)(A). This approach, in fact, is consistent with legal requirements and common practice concerning mitigated negative declarations generally under CEQA. (See, e.g., Pub. Resources Code, § 21080, subd. (c)(2).) Accordingly, Agency believes the commenters' recommended change is not warranted.

Agency also believes no change to the proposed amendment is warranted in response to the commenters' remarks regarding the mitigation benefits of other biological resource protection plans or their related remarks regarding EIRs and EIS's. Agency believes as a matter of policy that proposed section 15065(b)(2)(A) and (B) are properly limited to HCPs and NCCPs approved in reliance on an EIR or EIS. For additional detail, please see Agency's response to comments regarding proposed section 15065 by Gary Winters on behalf of the California Department of Transportation dated October 27, 2003; and Agency's responses to comments regarding proposed section 15065(b)(2) by Laura Simonek on behalf of the Metropolitan Water District dated October 16, 2003, and Sempra Energy dated October 27, 2003.

Additionally, Agency emphasizes two important points. First, Agency disagrees that, absent the changes recommended by the commenters, proposed section 15065 "will be read to require EIRs whenever HCPs or NCCPs are not used to mitigate impacts to species." Commenters overlook proposed section 15065(b)(1). This proposed amendment establishes an exception to the requirements in proposed section 15065(a) where project modifications or mitigation measures avoid or reduce the potential for significant effects to a point where clearly no significant effect would occur. Public agencies are free to exercise their discretion under proposed section 15065(b)(1) against the backdrop of the controlling standard of review, regardless of whether an HCP, NCCP or other biological resource protection plan is at issue. Proposed section 15065(b)(1), in this respect, specifically authorizes public agencies to reach the very conclusion that the commenters suggest cannot or will not be made with the proposed amendment.

Second, Agency disagrees there is "no need . . . at all" for proposed section 15065(b)(2). According to the commenters, the proposed amendment is

unnecessary because, “if an EIR or EIS has already been prepared and the species-related impacts of a project [are] mitigated, the project proponent will *always* have the ability to rely upon a negative declaration with respect to species-related impacts, *regardless* of whether the other criteria in Subsection (b)(2) are satisfied.” (Italics in original.) Commenters’ assertion is overly broad. The ability to prepare a negative declaration following an EIR is not a certainty, for example, where CEQA’s “tiering” provisions do not apply. (See, e.g., Pub. Resources Code, §§ 21093, 21094.) In such cases, a public agency may be able rely on or incorporate by reference mitigation measures detailed in the relevant EIR, but where substantial evidence supports a fair argument that the project, even as mitigated, might have a significant effect on the environment, preparation of an EIR would be required. Finally, for additional detail regarding the need for and benefits of proposed section 15065(b)(2), please see Agency’s response to Best, Best & Krieger LLP, Jennifer T. Buckman, October 27, 2003, on this section.

Agency also believes the commenters’ final remarks regarding proposed section 15065(b)(2)(C) warrant no change to the proposed amendment. Commenters urge Agency to delete proposed section 15065(b)(2)(C) because the standards articulated in the proposed amendment are “dramatically more stringent” than the permitting standards established by ESA or the NCCPA. In fact, proposed section 15065(b)(2)(C) is entirely consistent with existing law under CEQA. Where a proposed project has the potential to result in a significant effect on the environment (assuming there is no statutory exemption from CEQA), public agencies in California may prepare an EIR and mitigate the related impacts to the extent feasible or they may proceed with a mitigated negative declaration. This second option is only available - in the absence of substantial evidence supporting a “fair argument” to the contrary – where project changes or mitigation measures avoid or mitigate the significant effect to below a level of significance. (See generally Pub. Resources Code, §§ 21080, subds. (c)(2), (d).) The standards articulated in proposed section 15065(b)(2)(C) are entirely consistent with these well established principles under CEQA. Moreover, despite the commenters’ suggestion to the contrary, these existing mitigation standards under CEQA already apply to project approvals under current law, including the approval of a project involving the issuance of an incidental take permit under section 2081 of the Fish and Game Code or a Fish and Game Code section 2835 authorization under the NCCPA. Thus, for example, when the Department of Fish and Game approves a project under CEQA that involves the issuance of an incidental take permit under CESA, it must comply with the “minimize and fully mitigate” standard under CESA, as well as CEQA’s “substantive mandate” for mitigation. (See, e.g., Fish & G. Code, 2081, subds. (b), (c); (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123, citing Pub. Resources Code, §§ 21002, 21081.) Agency has no authority to change these existing legal standards, regardless of the commenters’ view that, “[i]f an HCP satisfies the requirements of [ESA] or the [NCCPA], that should be more than sufficient.”

Name/Date: Contra Costa Council, Angie Coffee, June 9, 2004.

Summary: Commenter makes the same statements regarding proposed section 15065(b)(2) in a nearly identical fashion as the California Association of Realtors et al. in their letter dated June 11, 2004. Please see Agency's summary of the California Association of Realtors' comments for a more detailed summary. The present commenter also makes a number of other remarks.

Commenter is concerned about language in proposed section 15065(b)(2)(A) requiring project applicants to "implement mitigation requirements" set forth in a relevant HCP or NCCP. According to the commenter, in most instances "it is up to the local agency" as the permit holder under an HCP or NCCP, or the agency's delagatee, to "actually *implement* the required mitigation[.]" (Italics in original.) Commenter recommends the pertinent language be changed to require project proponents to agree to comply with applicable requirements in an HCP or NCCP.

Commenter also contends Agency should clarify that proposed section 15065(b)(2) is "not the exclusive means under CEQA of ensuring that impacts on the species covered by section 15065 are mitigated." Specifically, the commenter recommends the word "furthermore" in proposed section 15065(b)(2) be replaced with, "Not in limitation of the provisions of Subsection 15065(b)(1) above[.]" In the commenter's view, "[t]his will ensure that, if an HCP satisfying the requirements of Subsection (b)(2) is not available[,] . . . a project proponent has other means available of assuring that the relevant impacts are mitigated and the need for an EIR is obviated."

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. As noted above in the comment summary, the commenter makes the same statements regarding proposed section 15065(b)(2) in a nearly identical fashion as Nick Cammarota et al. on behalf of the California Association of Realtors et al. in their letter dated June 11, 2004. For a detailed response to these comments, please see Agency's response to comments regarding proposed section 15065(b)(2) by California Association of Realtors dated June 11, 2003.

Agency also believes no change is warranted to proposed section 15065(b)(2)(A) in response to the commenter's concerns regarding implementation of required mitigation measures in an approved HCP or NCCP. See Agency's response to comments regarding proposed section 15065(b)(2) by California Association of Realtors dated June 11, 2003.

Finally, Agency disagrees proposed section 15065(b)(2) should be changed as recommended by the commenter to clarify that proposed section 15065(b)(2) is "not the exclusive means under CEQA of ensuring that impacts on the species covered by section 15065 are mitigated." That policy goal is achieved by the

broader language proposed section 15065(b)(1). This latter section articulates the general principle that, even with the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species, a lead agency need not prepare an EIR if project modifications or mitigation measures would avoid or reduce the significant effect to a point where clearly no significant effect on the environment would occur. Agency does not believe the change recommended by the commenter is warranted as a result.

Name/Date: East Contra Costa County Habitat Conservation Plan Association, John Kopchik, June 11, 2004.

Summary: Commenter supports the concepts embodied by proposed section 15065(b)(2), but contends the "proposed changes do not achieve this goal." In the commenter's view, the proposed language "does not accurately describe how an approved regional HCP/NCCP works." Commenter recommends proposed section 15065(b)(2)(A) be revised to read, in pertinent part, that "'the project proponent has agreed to comply with the applicable requirements of an approved [HCP]' to more accurately reflect how regional HCPs and NCCPs work."

Commenter also recommends deleting proposed section 15065(b)(2)(C). According to the commenter, this proposed section "introduces a new standard in CEQA that exceeds the state and federal standards under which HCPs and NCCPs are approved." Commenter asserts "HCP and NCCP standards should be sufficient to satisfy CEQA standards for species covered by the HCP or NCCP."

Response: These comments are on portions of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to these comments is not warranted. Moreover, the Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. See Agency's response to comments regarding proposed section 15065(b)(2) by the California Association of Realtors dated June 11, 2004.

Agency also disagrees proposed section 15065(b)(2)(A) should be revised to "accurately describe how an approved regional HCP/NCCP works." See Agency's response to comments regarding proposed section 15065(b)(2) by the California Association of Realtors dated June 11, 2004; and Agency's response to comments by the Contra Costa Council dated June 9, 2004.

Name/Date: Sandra L. Genis, June 10, 2004.

Summary: Commenter recommends deleting proposed section 15065(b)(2). According to the commenter, the proposed amendment should be deleted because: (1) it conflicts with proposed section 15064(h)(3); (2) it conflicts with proposed section 15152(f); (3) "even if there is no net loss in habitat, there may

be a loss in habitat value" that "would remain unexamined" with the proposed amendment; (4) adherence to or implementation of an approved NCCP "does not guarantee that a species will be preserved; (5) it "appear[s] to exempt a project for [sic] the need for a subsequent or supplemental EIR . . . as required by section 21166(b) of the Public Resources Code"; and (6) it will exacerbate "misunderstandings and/or misrepresentations" regarding NCCPs that currently exist in the commenter's opinion.

Response: These comments are on portions of the proposed amendments that Agency did not propose to change further in the language proposed pursuant to section 11346.8(c) of the Government Code. Therefore, a detailed response to these comments is not warranted. Moreover, the Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. First, Agency disagrees proposed section 15065(b)(2) conflicts with proposed section 15064(h)(3). The latter proposed amendment provides that, notwithstanding compliance with a specified plan or mitigation program, the possible effects of a proposed project may still be cumulatively considerable and thus require preparation of an EIR. In this respect, proposed section 15064(h)(3) underscores compliance with an approved plan is not a basis to conclude no EIR is required if substantial evidence supporting a fair argument of a significant effect exists.

Proposed section 15065(b)(2) provides, in turn, that a lead agency "need not" prepare an EIR "solely" because of the potential to result in impacts subject to proposed section 15065(a)(1) if the potential for such impacts can be avoided or reduced to below a level of significance. The proposed amendment, in this sense, authorizes public agencies to conclude that projects with the potential to result in certain impacts subject to the mandatory findings need not prepare an EIR in all circumstances. Moreover, nothing in proposed section 15065(b)(2) compels such a conclusion. Indeed, any conclusion under proposed section 15065(b)(2) would necessarily be made under the controlling standard of review. Accordingly, where the issue is whether an EIR is required in the first instance, and even if proposed section 15065(b)(2) appears to apply, where substantial evidence supports a fair argument that a proposed project may result in a significant impact, an EIR must be prepared. Agency disagrees, as a result, that proposed section 15065(b)(2) conflicts with proposed section 15064(h)(3).

With respect to commenter's remarks that the proposed amendment conflicts with proposed section 15152(f), Agency has withdrawn all proposed amendments to section 15152, so commenter's remarks are moot.

Agency believes the commenter's third remark in the summary above also suffers from similar misperceptions. Commenter urges Agency to delete proposed section 15065(b)(2) because, "even if there is no net loss in habitat, there may be a loss in habitat value" that "would remain unexamined" with the proposed amendment. Agency disagrees. Nothing in the proposed amendment

forecloses or prohibits the consideration of the environmental effects highlighted by the commenter. Once again, proposed section 15065(b) merely provides an exception to the mandatory findings of significance in certain limited circumstances. Even where a proposed project is consistent with the requirements detailed in proposed section 15065(b), a lead agency must still decide whether the proposed project, even as revised, may have a significant impact on the environment. Accordingly, despite the commenter's remarks to the contrary, the proposed amendment would not foreclose or prohibit consideration of potentially significant impacts under CEQA.

Agency believes the commenter's fourth remark in the summary above also warrants no change to proposed section 15065(b)(2). Commenter contends adherence to or implementation of an approved NCCP "does not guarantee that a species will be preserved[.]" Commenter suggests, as a result, that adherence to or implementation of mitigation requirements in an approved NCCP should not be a basis for public agencies to conclude impacts on endangered, rare or threatened species are avoided or mitigated to below a level of significance. Agency disagrees. Approval of an NCCP under State law is governed by strict standards regarding the preservation and conservation of covered species and their habitat. (See generally Fish & G. Code, § 2820.) Once an NCCP is approved by the local implementing agency and the Department of Fish and Game, Agency believes public agencies should be able to consider the mitigation requirements in such a plan in determining whether impacts are significant under CEQA. This is not to say, however, as the commenter appears to suggest, that strict adherence with an NCCP will always support a conclusion that related impacts are less than significant, particularly against the backdrop of CEQA's "fair argument" standard. In Agency's view, the commenter's related remarks warrant no change to proposed section 15065(b)(2).

Commenter's fifth remark concerning Public Resources Code section 21166 also warrants no change to proposed section 15065(b)(2). Commenter suggests the proposed amendment will exempt public agencies from the need to prepare subsequent or supplemental environmental analysis where substantial changes occur with respect to the circumstances under which a project is being undertaken. Agency disagrees. Nothing in proposed section 15065(b)(2) changes or conflicts with the statutory requirements in Public Resources Code section 21166, subdivision (b). The proposed amendment establishes an exception to the mandatory findings of significance in proposed section 15065(a)(1) that is consistent with existing law governing the preparation of mitigated negative declarations. It does not, as the commenter suggests, stand for the proposition that compliance with an approved HCP or NCCP always avoids or renders significant impacts on endangered, rare or threatened species less than significant under CEQA. The proposed amendment, as a result, creates no exemption from the requirements of Public Resources Code section 21166.

Finally, Agency disagrees proposed section 15065(b)(2) will exacerbate "misunderstandings and/or misrepresentations" regarding NCCPs that currently exist in the commenter's opinion. Overall, Agency believes proposed section 15065 substantially improves the mandatory findings of significance as compared to existing CEQA Guidelines section 15065. This is not to say the proposed amendment addresses all of the difficulties associated with implementation of the NCCPA in California. In Agency's view, however, the prospect that the proposed amendment will not address all of the difficulties associated with this important conservation program is not a reason to delete proposed section 15065(b)(2).

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, June 9, 2004.

Summary: Commenter "reaffirm[s]" its recommendation to delete proposed section 15065(b)(2)(B) for the reasons detailed in its prior letter dated October 16, 2003. Commenter also suggests in general terms that proposed section 15065(b)(2) be expanded to cover other "legal mechanisms" authorizing take of endangered, rare or threatened species under State and federal law.

Response: Agency believes no change to proposed section 15065(b)(2) is warranted by the commenter's remarks. For additional detail, please see Agency's response to the commenter's prior remarks regarding proposed section 15065(b)(2) dated October 16, 2003. With respect to the commenter's remarks regarding other "legal mechanisms" authorizing take, please see Agency's response to comments regarding proposed section 15065(b)(2) by the American Planning Association dated September 22, 2003.

Name/Date: Shute, Mihaly & Weinberger LLP, Jenny K. Harbine, June 11, 2004.

Summary: Commenter contends proposed section 15065(b)(2) is "invalid" because (1) the reference to mitigation requirements in approved HCPs and NCCPs "deem[s] specific types of mitigation adequate [to avoid preparation of an EIR] no matter the circumstances"; (2) mitigation requirements in an HCP or NCCP "can never" avoid or reduce impacts on endangered, rare or threatened species to a point where "clearly no significant effect" on the environment will result; and (3) proposed section 15065(b)(2) is "analogous" to former CEQA Guidelines section 15064(h), which the judiciary set aside in *Communities for a Better Environment v. California Agency* (2002) 103 Cal.App.4th 98.

Response: The Agency believes no changes to the proposed amendments are warranted by commenter's remarks. See Agency's response to the commenter's prior remarks regarding proposed section 15065(b)(2) dated October 27, 2003 and Agency's response to the comments of Sandra L. Genis on section 15065(b)(2) dated June 11, 2004.

SECTION 15075. Notice of Determination on a Project for which a Proposed Negative or Mitigated Negative Declaration has been Approved.

Section 15075(a)

Name/Date: Beveridge and Diamond, P.C., Jennifer Hernandez, June 11, 2004.

Summary: Commenter states that Agency should define the term "phase" in CEQA Guidelines section 15075(a) to avoid misinterpretation that a Notice of Determination is required for every discretionary permit or approval for the same project. Commenter's concern is that if a Notice of Determination is filed at each discretionary decision in the planning process, there would be repeated times for challenging the same project under CEQA—denying all parties a measure of finality in the CEQA review process. Commenter states that the term "phase" should be clarified to exclude discretionary approvals for all components of a "project" evaluated in an EIR, unless the EIR expressly identifies one or more future "stages" of a project as potentially requiring further environmental review pursuant to CEQA Guidelines section 15167(b).

Response: Agency believes no changes to the proposed amendment are warranted by commenter's remarks. Commenter's suggestion is beyond the scope of the amendments proposed pursuant to section 11346.8(c) of the Government Code and do not warrant a detailed response. Moreover, this proposed amendment is not a substantive change from the current Guidelines, which require the lead agency *to file a notice of determination after deciding to carry out or approve each phase*. (CEQA Guidelines § 15075(a).) The amendment is intended to make the notice of determination filing requirements for negative declarations more consistent with the notice of determination filing requirements for EIRs (see CEQA Guidelines § 15094), to clarify the contents and format of the notice of determination and to ensure consistency with sections 21108 and 21152 of the Public Resources Code.

Section 15075(e)

Name/Date: Beveridge and Diamond, P.C., Jennifer Hernandez, June 11, 2004

Summary: Commenter states that the proposed amendment to 15075(e) represents critical textual modifications that create internal consistency and provide needed direction to the public for purposes of complying with key requirements in the Guidelines.

Response: Agency notes this support of the proposed amendment.

Section 15075(g)

Name/Date: Beveridge and Diamond, P.C., Jennifer Hernandez, June 11, 2004.

Summary: Commenter states that the proposed amendment to 15075(g) represents critical textual modifications that create internal consistency and provide needed direction to the public for purposes of complying with key requirements in the Guidelines.

Response: Agency notes this support of the proposed amendment.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: Commenters state that Guidelines sections 15075(g) and 15094(g) should be removed because they are contrary to section 21167 of the Public Resources Code, which indicates that the limitations period begins to run when the Notice of Determination is filed, and does not require the Notice of Determination to be posted.

Response: Agency does not believe commenters' remarks warrant a change to proposed section 15075(g). See Agency's response to Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003 on this section.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support the proposed revision but suggest additional changes to Guidelines section 15075(g), as follows:
(g) The ~~filing~~ *posting* of the notice of determination pursuant to subsection (c) above for state agencies and the ~~filing and~~ posting of ~~such~~ the notice of determination pursuant to subsections (d) and (e) above for local agencies, starts a 30-day statute of limitations on court challenges to the approval under CEQA.

Response: Agency does not believe that commenters' remarks warrant a change to proposed section 15075(g). See Agency's response to California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004, and Planning and Conservation League Foundation and Defenders of Wildlife, J. William Yeates, October 27, 2003 on this section.

SECTION 15082. Notice of Preparation and Determination of Scope of EIR.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: The notice provisions of section 15082 (and also sections 15062, 15085 and 15094) require the location of a project to be identified on a "specific map," which is a new term that is being introduced to the Guidelines. Commenters note that the location provision adds complexity by stating that the preferred map is a copy of a U.S.G.S. topographic map, which is more detailed than necessary and outdated for most of California. Commenters state that the notice provisions should be modified to be consistent with section 15124 (a), which simply requires a "detailed map, preferably topographic."

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' June 11, 2004 remarks on section 15062.

Name/Date: Planning Resources, Sandra Genis, June 10, 2004.

Summary: Commenter reiterates her concern regarding the need to give notice to the general public with all CEQA notices, including the Notice of Preparation. Commenter states that inclusion of the public as early as possible is essential to the public purpose of CEQA. Commenter suggests that section 15082(a) require that the Notice of Preparation be given to any entity that would normally receive notice of the project pursuant to state planning and zoning law, and that section 15082(c) requires a scoping meeting notice to be given by direct mail and through newspaper publication.

Response: This comment is outside the scope of the amendments proposed pursuant to section 11346.8(c) of the Government Code. See Agency's response to commenter's October 27, 2003 remarks on the initially proposed language for section 15082.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters generally support the proposed revision to this section. However, commenters state that the phrase "if it has not already done so in accordance with section 15063(h)" at the end of the first sentence in section 15082(c)(1) should be deleted. Commenters also state that the reference to

section 15206 may be inappropriate, since Agency has decided to withdraw the amendment to section 15206(c).

Response: Agency has deleted the phrase "if it has not already done so in accordance with Section 15063(h)" from section 15082(c)(1). The reference to section 15206 remains appropriate, and is consistent with section 21083.9(a)(2) of the Public Resources Code, which requires the lead agency to call at least one scoping meeting for any project of statewide, regional, or areawide significance.

SECTION 15085. Notice of Completion.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: Commenters state that the notice provisions of section 15085 (and also sections 15062, 15082 and 15094) would require the location of a project to be identified on a "specific map," which is a new term that is being introduced to the Guidelines. Commenters also note that the location provision adds complexity by stating that the preferred map is a copy of a U.S.G.S. topographic map, which is more detailed than necessary and outdated for most of California. Commenters state that the notice provisions should be modified to be consistent with section 15124 (a), which simply requires a "detailed map, preferably topographic."

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' June 11, 2004 remarks on section 15062.

Name/Date: County Sanitation Districts of Los Angeles County, John D. Kilgore, June 9, 2004.

Summary: Commenter suggests that the location requirement in a Notice of Completion be consistent with section 15124 (Project Description) which requires the "precise location and boundaries of the proposed project" to be shown on a detailed map, preferably topographic as well as a regional map.

Response: Agency does not believe commenter's remarks warrant a change to the proposed amendment. See Agency's response to commenter's October 23, 2003 remarks on the initially proposed language for section 15085.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support the proposed revision to this section, but recommend additional language in section 15085(b) to require more detailed information regarding the lead agency's contact person, and the inclusion of a project title and State Clearinghouse number on the Notice of Completion.

Response: Agency notes commenters' support, but does not believe commenters' recommendation for an additional revision warrants a change to the proposed amendment. See Agency's response to commenters' October 27, 2004 remarks on the initially proposed language for section 15085.

SECTION 15088. Evaluation of and Response to Comments.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support the proposed revision to this section.

Response: Agency notes this support of the proposed amendment.

SECTION 15088.5. Recirculation of an EIR Prior to Certification.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters reiterate their October 27, 2003 comments generally supporting Agency's revision to this section but recommending that notice be given to all adjacent property owners, whether those property owners commented on the Draft EIR or not, consistent with requirements of section 21092.2 of the Public Resources Code. Section 21092.2 of the Public Resources Code requires the same notice be given for the recirculated document as was given for the original.

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' remarks on initially proposed amendments to section 15088.5.

SECTION 15094. Notice of Determination.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties

Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: The notice provisions of section 15094 (and also sections 15062, 15085 and 15082) would require the location of a project to be identified on a "specific map," which is a new term that is being introduced to the Guidelines. Also, the location provision adds complexity by stating that the preferred map is a copy of a U.S.G.S. topographic map, which is more detailed than necessary and outdated for most of California. The notice provisions should be modified to be consistent with section 15124 (a), which simply requires a "detailed map, preferably topographic."

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' June 11, 2004 remarks on section 15062.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters generally support the proposed revisions to section 15094, but recommend deleting the duplicative phrase "by the lead agency" at the end of section 15094(a), and recommend that sections 15094(c) and (d) be changed from "the lead agency shall file the notice of determination" to "the notice of determination shall be filed."

Response: Agency has deleted the duplicative phrase "by the lead agency" at the end of section 15094(a). With respect to the proposed change in sections 15094(c) and (d), Agency does not believe that the language suggested by the commenters ("the notice of determination shall be filed") would add clarity to this section.

SECTION 15152. Tiering.

Agency has withdrawn all proposed amendments to section 15152 for this rulemaking cycle. The following are summaries of comments made regarding the amendments proposed pursuant to section 11346.8(c) of the Government Code. No response to comments is necessary in light of Agency's withdrawal of the proposed amendments.

Name/Date: Fairfield Residential, LLC , Dan Milich, May 28, 2004.

Summary: Commenter suggests checking the numbering sequence for this section, indicating that the use of subdivisions (2) and (3) in subdivision (d) should be corrected.

Name/Date: California Association of Realtors, Eileen Reynolds; California Building Industry Association, Nick Cammarota; California Business Properties Association, Cliff Moriyama; California Chamber of Commerce, Valerie Nera; Consulting Engineers & Land Surveyors of California, Keith Dunn; and Transportation Corridor Agencies, Walter D. Kreutzen; June 11, 2004. League of California Cities, Daniel Carrigg, June 11, 2004.

Summary: Commenters reiterate comments originally submitted on October 27, 2003, stating that the proposed revisions to 15152 are inconsistent with section 21068.5 of the Public Resources Code and with the purpose of tiering. Commenters also state that the revisions would likely be overturned if challenged. Commenters identify three major areas of concern:

1) Commenters believe that the proposed language conflicts with section 21166 of the Public Resources Code and CEQA Guidelines sections 15162 – 15164. Specifically, commenters state that these sections identify the only circumstances in which a subsequent or supplemental EIR is required. Commenters also state that the amendments would conflict with numerous CEQA concepts, including the following: CEQA documents that are not legally challenged are final; mitigation need not be adopted if infeasible; an EIR can be certified and a project approved despite significant adverse environmental effects; and there is a high threshold for preparation of subsequent and supplemental environmental documents.

2) Commenters state that added text in subdivision (d)(2) expands the regulatory burden on the lead agency and creates new opportunity for legal challenges. Commenters also find subdivision (d) confusing because it is unclear whether it requires a new environmental document or merely findings associated with approval of a later project.

3) Commenters remark that the proposed language for subdivision (d) would discourage voluntary agreement to mitigation measures and would conflict with section 21166 of the Public Resources Code and with Guidelines section 15162(a)(3)(C)(D).

Name/Date: Planning Resources, Sandra Genis, June 10, 2004.

Summary: Commenter raises the same issues as those raised in its October 27, 2003 comments on the initially proposed language for this section.

Name/Date: The Metropolitan Water District, Laura J. Simonek, June 9, 2004.

Summary: For the most part, commenter raises the same issues as those raised in its October 16, 2003 comments on the initially proposed language for this section. In addition, commenter offers an example of how the revisions would require creation of new documentation to review an issue that has not changed since the original EIR was completed. In its example, a lead agency for a subsequent project would be required to complete a new cultural survey where the original survey that encompassed the area of the later project supported a finding that significant unmitigable impacts would occur and no other new mitigation measures are available to change that result for the later project.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters raise the same issues as those raised in their October 27, 2003 remarks on the initially proposed language for this section.

SECTION 15126.4 .Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects.

Section 15126.4(b)(3)(C).

Name/Date: Senator John Burton, California State Senate, June 7, 2004. San Diego Archeological Center, Courtney Ann Coyle, June 10, 2004. Bruce G. Gallagher, June 10, 2004.

Summary: Commenters support the inclusion of curation language into the data recovery section in section 15126.4(b)(3)(C).

Response: Agency notes this support of the proposed amendment.

SECTION 15130. Discussion of Cumulative Impacts.

Name/Date: Regional Council of Rural Counties, Mary Pitto, June 3, 2004.

Summary: Commenter notes that although the definition of probable future project has been withdrawn, the section number is still referenced in section 15065(a)(3).

Response: Agency has deleted the phrase "as defined in section 15130" from the end of section 15065(a)(3).

SECTION 15183. Projects Consistent with a Community Plan, General Plan, or Zoning.

Name/Date: Beveridge & Diamond, P.C., Jennifer L. Hernandez, June 11, 2004.

Summary: Commenter supports Agency's decision to withdraw the initially proposed amendments. Commenter states that the amendments, as initially proposed, "unreasonably stretched" the analysis of "cumulative impacts" as discussed in *Communities for a Better Environment.*

Response: Agency notes this support of the withdrawal of the proposed amendments.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, June 9, 2004.

Summary: Commenter supports the Agency's decision to withdraw the initially proposed amendments to this section.

Response: Agency notes this support of the withdrawal of the proposed amendments.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters request that Agency reinstate the amendments originally proposed to this section.

Response: Agency does not intend to reinstate the withdrawn amendments.

SECTION 15205. Review by State Agencies.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary Akens, June 11, 2004.

Summary: Commenters concur with Agency's proposed addition of the phrase "or mitigated negative declaration" to the second sentence of subsection (e) of

this section. Commenters also reiterate suggestions from their October 27, 2003 remarks on the initially proposed language.

Response: Agency notes commenters' support for the addition of "or mitigated negative declaration" to subsection (e). With respect to commenters' other remarks, Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' October 27, 2003 comments on the initially proposed language for this section.

SECTION 15206. Projects of Statewide, Regional, or Areawide Significance.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support Agency's original proposed revisions to this section. Commenters request a reconsideration of the decision to withdraw the revisions to subsection (c) from consideration for adoption.

Response: Agency has withdrawn the proposed revisions to section 15206(c). Agency does not intend to reinstate these withdrawn amendments.

SECTION 15330. Minor Actions to Prevent, Minimize, Stabilize, Mitigate, or Eliminate the Release or Threat of Hazardous Waste or Hazardous Substances.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters raise the same issues as those raised in their October 27, 2003 remarks on the initially proposed language for this section.

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' October 27, 2003 remarks on the initially proposed language for this section.

SECTION 15313. Acquisition of Lands for Wildlife Conservation Purposes.

Name/Date: Best, Best & Krieger, Jennifer T. Buckman, June 11, 2004.

Summary: Commenter registers general support for the initially proposed language, but reiterates initial concerns from its October 27, 2003 comments and incorporates those comments by reference.

Response: Agency does not believe commenter's remarks warrant a change to the proposed amendment. See Agency's response to commenter's October 27, 2003 remarks on the initially proposed language for this section.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, June 9, 2004.

Summary: Commenter requests that Agency reconsider proposed changes addressed in its October 27, 2003 comments and maintains that Agency's proposed changes to Class 13 do not provide greater clarity. Commenter suggests that Agency wait for the courts to interpret the meaning of Class 13.

Response: Agency believes the initially proposed language for Class 13 is reflective of existing law and clarifies the use of that exemption. See Agency's response to commenter's October 27, 2003 remarks on the initially proposed language for this section. Agency does not believe that the courts have primary responsibility for clarifying the CEQA Guidelines. Section 21083(e) of the Public Resources Code requires that Agency certify and adopt guidelines to implement CEQA. (See also CEQA Guidelines § 15000.) Agency is also required to amend the Guidelines from "time to time to match new developments relating to CEQA." (CEQA Guidelines §15007.) In contrast, "[i]t is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA] or the [CEQA Guidelines] in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state guidelines." (Pub. Resources Code § 21083.1.)

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters appreciate the efforts of Agency to update the Guidelines and commenters reiterate their support for the initially proposed Class 13 language.

Response: Agency notes this support of the proposed amendments.

SECTION 15325. Transfers of Ownership in Land to Preserve Existing Natural Conditions and Historical Resources.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, June 9, 2004.

Summary: Commenter requests that Agency reconsider the proposed changes addressed in its October 27, 2003 comment letter and maintains that the proposed changes to Class 25 do not provide greater clarity. Commenter suggests that Agency wait for the courts to interpret the meaning of Class 25.

Response: To the extent that this comment raises the same issues as those raised in its October 27, 2003 comments on the initially proposed language, see Agency's response to those comments. In addition, Agency declines to adopt the suggestion that the courts and not Agency should clarify the CEQA Guidelines. See Agency's response to commenter's June 9, 2004 remarks on section 15313.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters appreciate the efforts of Agency to update the Guidelines. Commenters also reiterate their concern that "park" can apply to private recreational developments such as baseball and football stadiums. Therefore, commenters propose modification of Class 25, subdivision (f), as follows: (f) acquisition, sale, or other transfer to preserve open space or lands for *public* park purposes *consistent with preserving open space and habitat."*

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' October 27, 2003 remarks on the initially proposed language for this section.

SECTION 15333. Small Habitat Restoration Projects.

Name/Date: Beveridge & Diamond, P.C., Jennifer L. Hernandez, June 11, 2004.

Summary: Commenter states that the initially proposed language for section 15333 represents a critical textual modification that creates internal consistency and provides needed direction to the public for purposes of complying with key requirements in the Guidelines.

Response: Agency notes this support of section 15333.

Name/Date: California Farm Bureau Federation, Rebecca Sheehan, June 9, 2004.

Summary: Commenter requests that Agency reconsider proposed changes addressed in its October 27, 2003 comment letter and reiterates its belief that that the initially proposed Class 33 language will lead to the exclusion of a class of projects that will significantly impact the environment.

Response: Agency does not believe commenter's remarks warrant a change to the proposed amendment. See Agency's response to commenter's October 27, 2003 remarks on the initially proposed language for this section.

Name/Date: The Metropolitan Water District of Southern California, Laura J. Simonek, June 9, 2004.

Summary: Commenter reiterates its initial comments on Class 33 by enclosing a copy of its October 16, 2003 comment letter.

Response: Agency does not believe commenter's remarks warrant a change to the proposed amendment. See Agency's response to commenter's October 16, 2003 remarks on the initially proposed language for this section.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters are generally supportive of the proposed categorical exemption for small habitat restoration projects. However, commenters reiterate their request that Section 15333 be modified to add a new subdivision (d) requiring compliance with section 1600, et. seq. of the Fish and Game Code. Commenters also suggest revising the current subdivision (d)(6) to expressly require that culvert replacement projects comply with section 1600, et. seq. of the Fish and Game Code. Commenters also recommend that the acronym "NOAA" be replaced with the following: "National Oceanic and Atmospheric Administration (NOAA)."

Response: Agency does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' October 27, 2003 remarks on the initially proposed language for this section. Agency does not believe using the name "NOAA Fisheries" instead of "National Oceanic and Atmospheric Administration (NOAA)" will lead to confusion.

APPENDIX C.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters generally support the proposed revisions to Appendix C, but request that the Department of Fish and Game headquarters office be added to the Reviewing Agencies Checklist on page two of the Notice of Completion.

Response: Agency notes commenters' support of the proposed revisions, but does not believe commenters' remarks warrant a change to the proposed amendment. See Agency's response to commenters' October 27, 2003 remarks on the initially proposed language for this section.

APPENDIX D.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support the proposed revisions to Appendix D.

Response: Agency notes this support of the proposed amendment.

APPENDIX L.

Name/Date: Planning and Conservation League Foundation and Defenders of Wildlife, Mary U. Akens, June 11, 2004.

Summary: Commenters support the proposed revisions to Appendix L.

Response: Agency notes this support of the proposed amendment.

4. Consideration of Alternatives

Government Code section 11346.9(a)(4) requires the final statement of reasons to include a determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation. Government Code section 11346.9(a)(5) requires the final statement of reasons to include an explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses.

Please refer to section one, above, of this final statement of reasons for the required Resources Agency determination on alternatives. The California Farm Bureau Federation (CFBF) proposed an alternative to the proposed amendment of section 15065, asserting that deletion of the references to natural community conservation plans and habitat conservation plans would lessen negative impacts on farms and ranches, many of which (according to CFBF) are small businesses. The Resources Agency has rejected this proposed alternative because it would not achieve the specific purpose of the proposed amendment to "…provide an incentive for regional biological planning through the natural community conservation planning (NCCP) and habitat conservation planning (HCP) process…." (*See*, Initial Statement of Reasons, section 15065.) The Resources Agency has made the policy decision to encourage utilization of NCCPs and HCPs by amending Guideline section 15065. Adoption of CFBF's proposed alternative would require the Agency to abandon this policy goal.

5. Location of Rulemaking File

A copy of the rulemaking file is available for public inspection at:

The Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Contact: Sandra S. Ikuta, (916) 653-5481